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CASES

DECIDED IN THE

Supreme Court of Ohio

IN BANK

AT DECEMBER TERMS, 1833, 1834

REPORTED IN CONFORMITY WITH THE ACT OF ASSEMBLY

By CHARLES HAMMOND
ATTORNEY AT LAW

VOLUME VI

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CINCINNATI
ROBERT CLARKE & CO.
1872

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CASES

DECIDED BY THE

Supreme Court of Ohio,

IN BANK,

AT DECEMBER TERM, 1833.

PRESENT:

JOSHUA COLLETT, CHIEF JUDGE.
EBENEZER LANE, }
JOHN C. WRIGHT, } JUDGES.
REUBEN WOOD, }

C. LONGWORTH AND OTHERS v. R. WOLFINGTON AND OTHERS.

A purchaser of real estate at administrator's sale, if evicted by the heir, entitled to the benefit of the occupying claimant law.

THIS case was adjourned here for decision from the county of Hamilton. It was an application for the benefit of the occupying claimant laws under the following circumstances. The defendants were in the possession of the premises, which they claimed in virtue of a deed made by the administrators of Israel Ludlow to John Kidd, deceased, from whom they claimed by descent. The plaintiffs had recovered in ejectment upon a title deduced from the heirs of Israel Ludlow. The sale by the administrators hav-

ing been adjudged void in consequence of the order of sale made by the court of common pleas being held invalid, it was objected, in behalf of the plaintiffs, that the case did not come within any class of cases enumerated in the statute.

V. WORTHINGTON, for the plaintiffs, contended that the parties did not so claim under an adversary title, as to place the defend-
10] ant in a position to claim for improvements under the *statute. He cited 3 Peters, 47; 7 Wheat. 535; 4 Bibb, 466; 3 March, 202; 3 Ohio, 353, 574; 5 Ohio, 497.

STORER, for the defendants, cited Sug. Vend. 482; 1 Vern. 484; 6 Ves. 617; 8 Ves. 327; 1 Sch. & Lef. 115; 1 Wash. 433; Cooke (Tenn.), 298; 1 March, 246, 388; 3 March, 202; 2 Peters, 526; 1 Johns. 277; 17 Mass. 350; 9 Johns. 102; 4 Greenl. 214; Angel on Lim. 85; 3 Ohio, 553; 5 Ohio, 494.

COLLETT, C. J., delivered the opinion of the court:

The law of this state is framed to cover every case where a party is evicted from the possession of lands, which he had improved in the faith that he was the owner. In this state lasting and valuable improvements have frequently been made by persons in possession where the title was in another, and where the person making the improvements believed the land to be his own. Where this is the case, the party who receives the benefit and advantage of these improvements, upon every principle of equity, ought to compensate him who made them for his labor. The object of the statute is equitable, and may justly claim a liberal construction.

The cases provided for by the statute are of different classes. 1. Where the party in possession, and to be evicted, can show a plain and connected title from the records of some public office. 2. A party in possession under such a claimant, by deed, devise, descent, contract, bond, or agreement. 3. All this latter class in possession under a party claiming by deed, duly authenticated and recorded. 4. Where the party in possession claims under a sale on execution against any of the previously enumerated classes. 5. Where the party is in possession under a sale for taxes. 6. Where the possession is under a sale by executors, administrators, or guardians, or under a decree in chancery.

The court conceive that two different provisions of the statute embrace the case of the applicants. The administrators conveyed to Kidd, who died in possession, and from him the estate descended to the applicants. Kidd held, and was in possession, under a deed "*duly authenticated and recorded;*" and the applicants hold by descent from him. It is not material that this deed did not, in fact, convey title, in consequence of the invalidity of the order of court upon which it was based. The precise *case contem- [11 plated by the statute is, that where for some cause, though a deed be "*duly authenticated and recorded,*" it fails to convey title. Where the descent is cast under such a deed, the heir is let in to the benefit of the statute, though the ancestor could not have been. And this is but following, in a degree, the common law rule, that varied the remedies against the actual disseizor, and one in under him by descent.

In express terms, the benefit of the statute is extended to persons in possession, under a sale and conveyance made by executors or administrators. Here again, the sale and conveyance must be inoperative, before a case is made for the statute to act upon. It is not maintained but that the statute would apply were the applicants evicted under a distinct title, adverse and superior to that of Ludlow, for whose heirs the recovery is had. But it is insisted that a recovery against them, upon the same title they claim, is not embraced by the statute. The court are of a different opinion. The case is plainly within the terms of the statute, and as plainly within the wrong it was intended to remedy. The application is sustained.

Lessee of Boal and others v. King and others.

A writ of *fi. fa.*, issued without seal from a court having and using a seal, is void. A levy on such writ, and a sale on a subsequent valid writ, conveys no title.

This case was adjourned here for decision, from the county of Hamilton. It came up for decision on a motion for a new trial, made by the plaintiffs, on the following state of facts:

The plaintiffs, to show title in themselves, produced in evidence a record of a judgment rendered in the general court, in Hamilton

county, at March term, 1800, at the suit of Mills against Symmes; the original writ of *fi. fa. et lev. fa.* issued upon this judgment, returnable to March term, 1801, and returned levied upon the premises in question; a *vendi.*, returnable to October term, 1801; and the sheriff's deed, upon a sale made under the *vendi.*, dated September 10, 1801, acknowledged in open court by the sheriff, in conformity with the then existing law.

Upon examining these documents, it appeared that no seal had been attached to, or impressed upon, the original writ of *fi. fa. et lev. fa.*, the law requiring, and the general court then having and 12] using a seal to authenticate its process. The defendants *moved the court to reject the executions and deed for this defect, insisting that a writ of execution not under the seal of the court, was void. The court rejected the evidence, and the plaintiffs moved for a new trial.

N. WRIGHT, in support of the motion, contended:

1. The acknowledgment of the deed, in open court, was a confirmation of the sale. 2 Bin. 46, 277.

2. That a valid *fi. fa. et lev. fa.* should be presumed, after so great a length of time, where the sale was upon a valid *vendi.* and deed made.

3. That the valid *vendi.* invested the sheriff with power to sell; consequently, that the sale was voidable only, and not void, which should have been taken advantage of at the return of the writ. As to irregularities that are or are not fatal, he cited 3 Johns. 144; 4 Id. 89; 18 Id. 441; 19 Id. 60, 170; 1 Cow. 643; 2 Id. 455; 5 Id. 529; 9 Id. 182; 1 Wend. 524, 585; 5 Id. 103.

No argument was presented for the defendants.

Judge LANE delivered the opinion of the court:

No principle is more definitively settled, than that the process of a court having a seal can only be evidenced by its seal, which is the appointed mode of showing its authenticity. Without it, a majority of the court hold such process void. The cases in 19 Johns. 170; 5 Cow. 550, and 5 Wend. 133, show the necessity of a seal to writs. In the two latter, a seal is allowed to be affixed by way of amendment, because necessary to the writ's validity.

The practice in Pennsylvania is to hold the proceedings of the

sheriff, upon executions for the sale of real estate, subject to examination, and to hear objections in behalf of the defendant, at the time of taking the acknowledgment of the deed. If this opportunity of objecting is neglected, he is concluded. 2 Bin. 46, 227. But this implied confirmation seems to have cured irregularities only; it never was held to supply defects of power. No such practice of examining the sheriff's proceedings obtained here, until introduced by statute in 1822. Mere irregularities are now cured under this provision.

If the *fi. fa. et lev. fa.* were lost, the judgment, *vendi.* and deed, would induce the presumption that it had existed, and was regular; but where it is produced, and shows upon its face that it is defective, no such presumption can be raised.

*The valid *vendi.* does not supply the defect of the original [13 *fi. fa. et lev. fa.* The predicate of the *vendi.* is a previous valid writ of *fi. fa. et lev. fa.*, and a valid levy upon it. There must have been a *seizing* in execution upon authority to *seize.* This the *vendi.* could not confer. The direction to *sell* is not an authority to *take.*

A sheriff is not subject to punishment for omitting or refusing to execute a nugatory writ. He would certainly be excused for disobeying it.

New trial refused.

David Richardson v. William Spencer.

In an action on the case, againt the sheriff, for an escape on final process, he can not excuse himself by proof that the jail was insufficient, the county being liable to indemnify him if the escape was from that cause.

On the general issue in such action, it is competent for the defendant to prove, in mitigation of damages, that the debtor had no property.

Case against a sheriff for the negligent escape of a prisoner in jail on an execution, reserved in Licking. Plea, not guilty. At the trial, the plaintiff having proved his judgment, execution, arrest, commitment, and escape, rested. The defendant then offered evidence to prove that the escape arose from the insufficiency of the jail, and also that the debtor had no property. This evidence

being objected to and ruled out, a verdict was taken for the plaintiff. The defendant now moves for a new trial, because the evidence offered by him was improperly excluded from the jury.

DILLE and H. STANBERY, for the motion, cited 2 Term, 126; 3 Stark. Ev. 1348; 1 Wheat. Selw. 457; 2 Phil. Ev. 230; 7 Johns. 192; 2 Johns. 270; 5 Mass. 312; 3 Bibb, 356; 5 Day, 225; 7 Serg. & R. 273; 1 Ohio, 119; 2 Ohio, 352.

J. MATHIOT and S. W. CULBERTSON, contra.

Judge WRIGHT delivered the opinion of the court:

In the Commissioners of Brown *v.* Butt, 2 Ohio, 351, this court determined that it was incumbent upon the county to provide and keep up the public jail, and the duty of the sheriff to confine his prisoners in the county jail; that he had no voice in providing the 14] jail, *or in repairing it; nor any discretionary power to confine his prisoners anywhere else, in case of the insufficiency of the jail; and therefore, that "where an escape happens in consequence of the want of, or the insufficiency of a jail, the county must be eventually liable for the escape." The case of Campbell *v.* Hampson, 1 Ohio, 119, was decided on similar principles. In the first case, the court (page 354) also decided that the amount recovered against the sheriff furnished the rule of damage in the case by the sheriff against the county. The sheriff, then, where an escape results from an insufficient jail, is liable, in the first instance, to the plaintiff in execution; and the recovery against him clothes him with power to coerce indemnity from the county. It seems to us to follow conclusively that, in the suit against the sheriff, evidence of the insufficiency of the jail could not operate on general grounds to discharge the sheriff from liability; and on that account, as well as because of its tendency to screen the county from its ultimate liability to indemnify the loss occasioned by the neglect of its officers, the evidence offered by the defendant on that point was properly rejected by the court.

An act of Parliament, in England, gives the action of debt to persons injured by an escape from execution. In that action the plaintiff recovers the entire debt for which his debtor was in execution. But debt for such an injury does not lie at common law;

and our legislature has never provided for it in this state. The rights of the parties to the present suit remain as at common law, and by its rules we must determine the admissibility of the evidence rejected at the trial. The issue of not guilty admits the defendant to prove any matter which, according to the circumstances of the whole case, will, in equity, preclude the plaintiff from a recovery; or which tends, in case of recovery, to ascertain the actual amount of damages sustained. 1 Chit. Pl. 434; 8 Johns 453; Steph. Pl. 172. In such case the *prima facie* right of the plaintiff is to recover the whole debt due by his debtor, on proving the judgment, arrest, and escape. But this *prima facie* right may be rebutted by facts conducing to prove that in truth the loss was not the amount of the debt and to establish the exact injury. The total inability of the debtor to pay conduces directly to lessen the damages, and would be received to reduce them in all cases where the escape was not voluntary on the part of the officer. But a sheriff has no right to judge of the propriety of imprisoning persons *committed to his charge, or to permit [15 debtors to go at large, in the expectation of reducing the damage to be recovered of him by showing that no good could have resulted fram continuing the party in prison. Whether the case at bar, when all its circumstances are disclosed, will fall within the first or second class of cases, we can not tell. The facts must go to the jury, and the court take care to instruct them how to apply the law to the case as they find it. The court, on the circuit, were in error in excluding from the jury the evidence offered of the debtor's inability to pay, and for this reason a new trial is awarded, the costs to abide the event.

ELLIS S. BALDWIN *v.* THE STATE OF OHIO.

A bill of exceptions, not made part of the record, can not be considered upon a writ of error.

In a prosecution for keeping a disorderly tavern, it is not necessary for the prosecution to produce at the trial, the license. Equivalent proof may be given in evidence.

THIS was a writ of error to a judgment rendered in the county

of Preble, and adjourned here for decision from the Supreme Court of that county.

The plaintiff in error was indicted, as a licensed tavern-keeper, for keeping a disorderly house. The transcript of the record, returned with the writ of error, shows a trial and conviction, and a motion for a new trial with the causes, and the decision of the court overruling the motion, with its final judgment. No notice is found of the tendering or sealing a bill of exceptions. A detached paper is certified by the clerk as a copy of a bill of exceptions filed in the cause. There was no assignment of errors.

The paper produced as a bill of exceptions states that, on the trial, the prosecuting attorney, to prove that the defendant was a licensed tavern-keeper, produced the entry, in the journals of the court, granting him a license, and offered no other evidence to show that fact. The defendant moved the court to overrule the evidence, which the court refused to do.

J. Woods, for plaintiff in error.

McManus, prosecuting attorney, for the state.

16] *Judge Wood delivered the opinion of the court:

In civil cases, the bill of exceptions is made part of the record only on the application of the party. 29 Ohio Stat. 75. In criminal cases, it is made the imperative duty of the clerk to make the bill of exceptions a part of the record. 29 Ohio Stat. 160. If the clerk omit to perform this duty, the party is not without remedy, in the court where the omission takes place. But this court, upon a writ of error, can only notice matter inserted in the record. It can not look at that which ought to have been, but which is not so inserted. The paper, therefore, presented as a bill of exceptions, can not be made the foundation of a judgment here. Aside from this paper, there is no evidence before this court what the proof was, on the trial in the common pleas, nor what the charge was to the jury. Consequently, we can not pronounce that the common pleas have erred.

But if this bill of exceptions were before us, as part of the record in the case, what should be our judgment upon it?

The statute, in defining the offense for which the party was indicted, uses the words "*licensed tavern-keeper.*" The indictment

avers that the defendant was a "*licensed tavern-keeper.*" It became necessary to prove this averment. How should it be done? The license, if one issued, was in the hands of the defendant. The prosecution might have given him notice to produce it; and if he refused, might have given parol evidence of its contents. To prove that a license issued, circumstances might be resorted to: that the party kept a tavern, and that there was an entry of a license granted, entered on the journal of the common pleas. It would be, so far, legal testimony; and it could be no objection to the admission of this evidence, that the prosecution did not go farther, and prove notice to the defendant to produce the license, and then give evidence of its contents. The bill of exceptions, if looked to, only objects that the entry of license granted should be overruled, because no other evidence was offered that the defendant was a legally licensed tavern-keeper. The evidence conduced to prove the issue, and was admissible for that reason; not because it proved the issue entire. There could be no conviction without other evidence, such as that the defendant actually kept a tavern and a disorderly house, as charged in the indictment. One isolated fact, and nothing more, is presented. Against the proof of that, the objection would not be sustained. Upon either ground, the judgment of the common pleas must be affirmed.

---

*BANK OF STEUBENVILLE *v.* D. HOGE AND OTHERS. [17

Where credit or time is given by the creditor to the principal debtor, the security or indorser is discharged, if the credit be given upon an obligatory contract.

The defense is admissible at law as in equity.

THIS cause was reserved in the county of Jefferson. It was an action of debt upon a bond. The declaration was in the usual form. The defendants, Hoge, Andrews, and Jenkinson, craved oyer of the bond, which was had. It is in these words: "Know all men by these presents, that we, J. C. Bayless, D. Hoge, J. Jenkinson, W. R. Dickenson, and M. Andrews, are jointly and severally holden, and do stand bound and indebted unto the pres-

ident, directors and company of the Bank of Steubenville, in the full sum of seven thousand five hundred dollars, for the payment of which, in sixty days from the date hereof, well and truly to be made and done, at the Bank of Steubenville, to the said president, directors, and company, or their assigns, we do bind ourselves, our heirs, executors, and administrators, firmly by these presents," etc.

Upon this oyer the defendants named pleaded, in bar of the action, that in making and executing the writing obligatory, they made and executed the same as securities for John C. Bayless, the principal debtor, for a sum of money borrowed of the plaintiffs, the plaintiffs knowing that they were such securities. That since the commencement of this suit, the plaintiffs made an agreement with Bayless, the principal debtor, whereby they accepted from him a confession of judgment for the whole debt, upon a stipulation entered on the minutes of the court, that execution should be stayed, for one-third, eighteen months; one-third, twelve months; and one-third, six months; without the consent or knowledge of the defendants.

To this plea the plaintiff replied, that they ought not to be barred of their action by the matter set up in said plea, because the defendants jointly and severally bound themselves to pay the debt, as in the bond stipulated. The defendants demurred.

STOKELY and MARSH, for plaintiff.

D. S. COLLIER and C. J. WRIGHT, for defendants.

Judge LANE delivered the opinion of the court:

The record presents two questions: 1. Is the surety in a bond 18] discharged by the *obligee giving time to the principal without the surety's consent? 2. Is the surety estopped from setting up this giving of time, as a defense at law, where the relation does not appear on the face of the bond?

The first question has been already decided by this court in a similar case. 5 Ohio, 207. We have only to repeat the opinion there expressed. A creditor discharges the surety by an agreement that suspends his right to proceed against the principal debtor, and that the defense can as well be made at law as in equity. The cases in 2 Bibb, 467, and 2 Randolph, 333, are almost identical with the present.

The other point, now submitted for decision, is, whether the obligor is estopped, by his bond, from showing his relation as surety, except where the face of the instrument affords evidence of the fact. The doctrine of estoppel proceeds upon the ground that an obligor is concluded, at law, by his own admissions, under his own seal, in the instrument against which the objection is alleged. But there is no attempt here to deny the obligation of this paper, or to evade its admissions. Nothing appears on its face inconsistent with the suretyship of the defendants. The defense sets up a distinct and independent fact beyond the terms of the writing, not controverting any of its stipulations. If the obligation recited that the obligors were principals, there might be color for the assumption that the admission concludes them. In the absence of such recital we find nothing to stop them from proving the truth.

We have found two authorities somewhat countenancing this application of the doctrtne of estoppel in this case. In Hart v. United States, 1 Gallison, 33, the judge intimates a doubt whether the relation of the party need not appear on the face of the bond to open the defense at law. This was a trial on the circuit, and we do not perceive that the point was one presented for decision. We find no principle to warrant this doubt, and can not adopt it.

In Theobald's treatise on the Law of Principal and Surety, two cases are quoted, from the recent English reports, which appear to refer the defense to chancery. 1 B. & C. 682; 3 D. & R. 112. We have not access to those cases, and have but a meager abstract of the facts in one of them. We are too well persuaded of the correctness of our opinion to yield it to what we see of these cases. Wherever, by the forms of pleading, the evidence is admissible, the defense may as well be made at law as in equity; and we are unwilling to increase the delay, and to *multiply [19 the expense of litigation, by sending parties into equity to make defense against suits at law; unless, by allowing such defense, we trench upon known and well-settled principles. Judgment for defendants.

Judge WRIGHT, having been of counsel, did not sit in this cause.

Frederick Forsythe v. The State of Ohio.

Objections to the array of a jury, because it has varied in unessential particulars from the law in the selection, will not be listened to, nor will they be received after challenge for cause.

A venire for a petit jury should not contain a panel for a grand jury also.

A contract to do an unlawful or immoral act will not be enforced in courts of justice; and the violation of an agreement to participate in crime will not excuse the other party who does the act agreed upon, or other criminal acts in endeavoring to commit it.

A married woman is incapable in law to give consent to the breaking and entering the dwelling of her husband, with a view to the commission of adultery with herself.

An indictment for house-breaking, and committing in the house an assault and battery under the statute, must aver that some person resided or dwelt in the house.

Error to the common pleas of Huron county. The plaintiff in error was indicted, in the court below, for house-breaking. The indictment contained three counts: 1. For breaking and entering the mansion-house of A. Mason, and committing an assault and battery upon Mary, his wife. 2. For breaking and entering the mansion-house of Mason, *in which he and his family then lived*, and attempting to assault, beat, ill-treat, and abuse Mary, his wife. 3. For an assault and battery upon Mary Mason. The jury found the defendant guilty generally, and the court sentenced him to imprisonment in the cell of the county jail, to be fed on bread and water, for fifteen days; to pay a fine of two hundred and fifty dollars, and the costs, amounting to eighty-three dollars and five cents.

The counsel engaged in the defense, during the progress of the trial, seem to have waged war upon the court, and to have exerted themselves to multiply the obstacles in the way of its advance. Exceptions were taken at every step of the trial, and to almost every word which fell from the court. The record is so lumbered up, and the case so involved in obscurity, as to leave it no easy matter to find out the true state of it. In the language of the record, counsel took, "exception to all and every of the acts and opinions of the court, in overruling questions and testimony, and in its in-

20] structions and charge to the *jury; in its refusal to charge,

and generally in not permitting the defendant to make out his defense, as he offered to do."

For alleged errors in the conduct of the trial, the plaintiff in error seeks to reverse the sentence against him. The assignment of error throws no light upon the subject. It is—

1. That the court erred in its decision relating to the jury impaneled.

2. That the court erred in every decision made against the defendant, as shown by the record, and in that which deprived defendant of his legal defense.

3. That a great many other errors are shown in the case by the record.

No argument was submitted on either side.

Judge WRIGHT delivered the opinion of the court:

It is difficult gravely to respond to such an assignment of errors as is made on this record, or to grope one's way along the labyrinth of the many bills of exception it presents. I must, therefore, try to generalize.

The first objections taken in the court below were to the array. These were made after challenges for cause had been interposed and decided, and the jurymen had taken their seats. They were:

1. That the venire only contained the names of the petit jury, when it should have contained the names of the grand jury also. This was overruled. The defendant then moved to set aside the venire, and offered to prove, in support of his motion:

1. That the apportionment of jurors by the clerk was not in the ratio of the number of free white males in each township, as required by law.

2. That the clerk did not make a written statement of his doings, and give it to the sheriff.

3. That the apportionment was not made on the first Monday of September.

The court refused to hear the motion, and overruled the evidence offered in support of it.

What is erroneous in this proceeding? The venire should not have included the grand jury. They are distinct bodies, and should be separately summoned. The statute, as we understand it, does not require the two juries to be included in *the same [21

writ. The other objections to the jury, if all the party offered to prove be admitted as true, have no better foundation. The clerk is required by law, the first Monday of September, annually, to proportion the jurors for the year, among the free white males of twenty-one years old, in the respective townships, and give the same to the sheriff in writing, who, when he proclaims the October elections, is required to annex a notification to the trustees of townships of the number of jurors apportioned to each township. The trustees are, on the day of the election, to select good, judicious men, to the number required, and transmit their names to the clerk. The names of the jurors thus selected, are written upon separate pieces of paper, and put into a box, from which the clerk, in the presence of the sheriff, thirty days before each court, draws out twenty-seven ballots, the first fifteen of whom are to be summoned as grand jurors, and the remaining twelve as petit jurors. This statutory direction to the officers should be substantially followed, yet we are not prepared to say that unessential variations would be regarded as affecting the array. We have never known, in this state, an objection of this kind before. The profession, by universal consent, refuse to notice such matters, as this in no way endangers a fair trial. The objection at best was a mere technical one, and, in the opinion of the court below, was not made in technical time. Technicality is never more appropriately resorted to, than to meet and put down technical objections.

The record shows that, during the trial, it was proven that the defendant, about noon, hired Mason to go with his team about twelve miles, for a load of merchandise, and gave him money to pay his expenses for the night. Mason went for the load, but instead of staying over night, returned about dusk, came home the back way to avoid observation, and early went to bed with his wife. About ten o'clock, footsteps were heard approaching. The defendant came on to the porch, tried to enter by each of two doors, but finding both fastened, he approached the window and passed it. He soon turned again, raised the window six or eight inches, and let it down again. He again raised it, and fastened it up; then, partly entering, the blind hit his back, and he withdrew, stood erect a short time, and then slowly and gently crept through the window into the house. When in, he seized the bed clothes on Mrs. Mason's shoulder, and pulled them down. At this 22] instant, *Mason sprung from the bed, seized the defendant by

the hair of his head, threw him down, and held him until he begged for quarter. He was then let up, and having got his hat and shoes from the porch, was taken into another room, and detained for a time.

The legal questions presented by the counsel for the defendant, for the decision of the court during the progress of the trial, as we gather them from the record, may be resolved into two propositions:

1. Whether, in case the defendant entered the house with *intent* to commit adultery, and is foiled in effecting his object, he can be convicted, under the indictment, of breaking and entering and perpetrating any other unlawful act.

2. Whether in such case, it is competent for the defendant to prove that he was in the habit of visiting the wife, in her husband's absence, for criminal intercourse, as a fact from which the jury may infer that he broke and entered the house, and laid hands on the wife, with such intent only, at the time complained of?

The statute, 29 Ohio L. 144, prescribes the punishment for breaking and entering a mansion-house in the night season, *in which any person shall reside or dwell*, and committing, or attempting to commit, any personal *violence or abuse*. The *intent* with which the party enters forms no ingredient of the offense. The inquiries presented by the statute are: Did the accused break and enter the house in the night season? If so, did he commit, or attempt to commit, any personal abuse or violence? In this case, there was no question before the common pleas as to the breaking and entering the house with an illegal design—that of committing adultery. While prosecuting this unlawful purpose, the defendant rudely laid hands upon Mrs. Mason, and thus committed an act of violence or abuse, though of a less heinous character than he intended. Is he not answerable? If one strike another with intent to kill or maim, but fails of his object, that failure does not excuse him from liability for the assault and battery. If, then, the laying hold of Mrs. Mason was an attempt to commit adultery, it was an attempt at *abuse* of her; an attempt to do just what in fact was done, though not carried out to the full fruition of his hopes. What principle of law is violated in such case, by describing the act done in legal language? The first and third counts in the indictment charge the actual commission of an assault *and battery; the second, an attempt [23

to commit one, and otherwise to ill-treat and abuse Mrs. Mason. The court, in resolving the propositions in the affirmative, in our opinion fell into no substantial error. The party is liable for the act done, if it be one of personal violence or abuse. The law does not require that those precise words should be inserted in the indictment, but only that some act shall be charged to have been done or attempted of that character. If the terms were less general, and limited the offense to a breaking and entering, and the committing or attempting to commit an assault and battery, that particular act would be essential to the offense, and would have to be described.

The second general proposition, which conducts to the inquiries, how far the defendant had a right to protect himself, by reason of the consent of Mrs. Mason to his visiting her for criminal purposes, remains to be considered. The case made does not, in our opinion, require a very critical examination of this general proposition. We are not called upon to say whether one entering a house with the actual consent of the wife of the occupant, with a view to illicit intercourse, could be punished under the statute for breaking and entering the house. No such case is before us. The real question is: Would Mrs. Mason's consent that the accused should visit her in the absence of her husband, or proof of his being in the habit of visiting her when her husband was absent, even for a criminal purpose, conduce to prove her permission to him to break and enter the house for such purpose when the husband was present and by her side? It is absurd to suppose so. The evidence rejected in that view, therefore, could not have benefited the defendant; and, if it could be of no advantage to him, he was not injured by its rejection. We incline to think a married woman incapable in law, by consent, to authorize a third person to break open and enter the house of her husband for an unlawful purpose. Such consent, though ever so formally given, could not justify or legalize an infraction of law, or sanctify an unlawful purpose, and will any one pretend that the entering a man's house with intent to commit adultery with his wife, with any consent, save only that of the husband, is a lawful entry? Be this, however, as it may, the evidence of the defendant's habit of visiting this woman, in this case, was properly rejected by the common pleas. The indictment does not charge the breaking and entering the house to
24] have been with *any particular* *intent, nor does the law re-

quire the intent to be set forth. The charge is for breaking and entering (without reference to the intent), and committing and attempting to commit an assault and battery upon Mrs. Mason, and to ill use her. The offense is complete without reference to the design of the party in entering. The objection urged, that if the accused had obtained the consent of the wife to the unlawful interview, neither she nor her husband had power to withdraw it, because it would be a fraud upon the rights conferred upon him by the consent, is one that can meet no countenance where any just moral perception is found. The proposition is novel in our courts, and is supposed to have found its way into the temples of justice, for the first time, in this case. Does an agreement to disregard the decent proprieties which bind society together, and to trample under foot the laws of God and man, impose upon the parties to it a legal obligation to be enforced in the judicial tribunals of a christian community? Is it true that confederates in crime are to escape punishment in order that their criminal engagements may be performed? Not so. The law holds void and of no effect all contracts whose object is to violate its injunctions, or those of good morals. In providing punishment for criminal acts, while the *mere intention* to commit them is overlooked, the law holds out perpetual encouragement to the evil-disposed to abstain from crime; and it carries out the design in proffering absolution from legal obligation to perform unlawful agreements. The wanton, immoral, and illegal conduct, charged upon the defendant below, in our opinion, is in no degree excused or palliated by any supposed violation of the alleged contract of Mrs. Mason to become a partner in his guilt. We see nothing in the conduct of the trial by the court below which requires of us to reverse the sentence against the plaintiff in error.

We are called, however, to look to the indictment to ascertain if it charge an offense which warrants the conviction. The statute provides punishment for the breaking, etc., of any *mansion-house in which any person shall reside or dwell.* It is descriptive of the offense to allege that the house broken is the residence or dwelling-place of some one. The first count is defective in substance in omitting this allegation. The charge of committing an assault and battery upon a person "*then and there in said house being,*" can not, even after the verdict, be construed into an allegation that that person, or any other one, resided or *dwelt in [25

the house. The second count of the indictment charges the offense as in the house "in which the said Aurelius Mason and family then and there lived," and is in substantial conformity with the statute. This count affords a legal ground for the whole sentence without resorting to the first or third. The rule in criminal cases is the reverse of that which obtains in civil, and if there be good counts to authorize the conviction, the bad ones are held not to vitiate the sentence.

The judgment is affirmed, and remanded back to the court of common pleas for execution.

NOTE.—The bill of exceptions set forth in the record of the foregoing cause, is copied below as a legal curiosity.

"THE STATE OF OHIO
vs.
FREDERICK FORSYTHE. } *Indictment.*

"In this case the counsel for the defendant moved to quash the venire for the petit jury, after the case was called and the jurymen had taken their seats in the box, for the reason, that it only contained the names of twelve persons, and because the venire for the grand and petit jury should have been made out together instead of separately (a copy of which venire is hereto attached and made part of this bill of exceptions), which motion was overruled. The counsel for the defendant then called on the clerk for the record of the proceedings under the act relating to juries, and no such record being produced, the defendant's counsel then offered to prove, by parol, by the clerk of this court, coupled with a motion to set the venire aside and quash the same: 1. That the apportionment, made by the clerk, of jurors, was not in the ratio of the number of free white male inhabitants in each township, contrary to the second section of the act relating to juries. 2. That the clerk did not make, in writing, a statement of the number of jurors apportioned to each township, and deliver the same to the sheriff. 3. That if any apportionment of jurors was made by the clerk, it was not made on the first Monday of September. 4. The clerk has no record of his proceedings in the matter of the said apportionment of jurors. These motions were made after challenges for cause had been made on the part of the prosecution; which testimony, so offered by the defendant, the court overruled and refused to hear, and decided the motion against the defendant; to all which opinions and doings of the court the said defendant here excepts. And the jury being impaneled and sworn to try the issue joined, the state, in order to make out the issue on her part, produced as a witness, Aurelius Mason, who was sworn, and in his examination in chief, stated that on August 24, 1832, the defendant came to him and said he had a box of saddle-ware at the mouth of Huron, and wanted witness to go with his team and get it. Witness made excuse and said he could not go—this about ten o'clock in the day—that defendant went out and was gone

about an hour, and then returned, stating that he could get no other team, and he would not have it remain out on the dock for twenty dollars for that night. The witness thought at length that he might possibly go, consented and got ready about twelve o'clock, and went down to the mouth of river, and returned with *the box, and left some mill irons at Milan on his return; [26 that he got home a little after dark, eat his supper and went to bed. About ten o'clock in the evening heard footsteps on the porch, and then the person went to the door and gently raised the latch; and that door being fastened he went to the other door, and that being also fastened, he turned and went to the window, and went past it, and then turned back and raised the window six or eight inches, and then let it down, and then raised it again and put piece of broom handle under the window and partly entered; that the window paper struck his back, and he drew back and stood erect, and then after a little came in gently, some time in getting in, and when in seized hold of the bedclothes and pulled them part of the way down; then witness jumped out of the bed and caught him by the hair of his head, and that the defendant sprang for the window, but witness pulled him back and pulled him down and put his knee on him, and defendant cried for mercy; that witness held the bed-room door while he put some clothes on, and then both defendant and witness went into the other room, and defendant asked to go out to shed and and get his shoes and hat. Witness' house in Huron county; this affair happened there. Defendant seized the bedclothes near his wife's shoulder; the person who did this was Frederick Forsythe, the defendant. [The defendant forbears his cross-examination for the present, not waiving the right.]

"Mrs. Mary Mason was then called on behalf of the state, and being sworn, she stated that the first she heard was a footstep on the porch; that the person went to the kitchen door, and then he went to the square room door—then he went to the window, and then he went to the bed-room window and made some noise on the window, and got in and took hold of the clothes and pulled them down from her shoulders; then her husband seized the defendant. About ten o'clock.

"Cross-examined: States that she had not fairly been asleep—in a doze; at first she heard step on the shed, then at the latch of kitchen; it was but little distance from bed-room. He then went to square room door, and then raised the latch of that door, lightly; then went to square room window and tried to raise it; no tapping at door; might have been on bed-room window; gentle taps; window not fastened, that is, bed-room window; the stick had been used under the window, but she did not know where it was then; the window was raised; did not come in, passed, then came in before letting window down; then went directly toward bed; was in his stocking feet on the porch, light step; no carpet in the bed-room; not a word was said; husband had been in bed an hour; she spoke to him in an undertone; said that some person on the porch; did not suspect who until he came; lay still: it was between half and three-fourths of an hour between the time of his getting on the porch and getting into bed-room; her person not injured; saw Mr. Forsythe; said nothing to her husband; he would see him in morn-

ing; and the defendant went to the door; no conversation between the defendant and her; and after defendant went away, she asked her husband why he let him go. When she whispered to her husband that some one on porch, husband said, lie still, and we will see who it is; when he went to room window, she told her husband it was Forsythe; in whispers; the head of the bed was west; saw defendant's face in window; she lay foreside of bed; there was a man by the name of Samia, and one by the name of Felt, boarding there at the time; they slept in another room; Mr. Forsythe lives just opposite; frequently saw defendant; the said boarders not waked that night that she knew; saw defendant that afternoon; just after husband was gone; he came in and handed paper for her husband to take to Milan; did not sit down as she remembered; stayed little while and then went; defendant was at her house twice before her husband went away, to get him to go; said the first time that he wanted her husband to go; not many words passed; nothing said 27] about his coming home, only she asked him when he would come; her husband told her that Forsythe had given him one dollar to pay expenses for the night at mouth of Huron; returned a little after dark; was up; did not see the team; when letter brought by Forsythe, he did not say that her husband would stay all night; don't know but she asked defendant if her husband could go and get back that night; nothing said about repairing wagon; married before she came here; five years since they went to live where they now live; families of her husband and defendant on good terms; never visited; Mr. Forsythe was in there occasionally; defendant there frequently last summer; on friendly terms all last summer except one little spell; her husband did not deliver the box that night; next morning it was delivered; Mr. Forsythe occasionally held conversations with her in the absence of her husband at her house. This question was then put by defendant's attorney: Has not Forsythe for four or five years past, in the absence of your husband, frequently called in at your house and held conversations with you, and have not you and your husband in all that time been on terms of neighborly and friendly understanding with Forsythe? This question was objected to by the state's counsel, and by the court overruled, as a question not proper to be put. Witness stated further, that from the 11th of May to July last year, there were hostile feelings existing; do n't know that there was any on the part of her husband, and between him and Mr. Forsythe, but there was between herself and defendant at the time of the alleged offense. The defendant's counsel then put the question: What was the cause of these hostile feelings on your part? Which question was objected to by the state, and overruled by the court. This question was then put by the defendant: Between the 11th of May last and the 24th of August following, was there not an interchange of neighborly acts between yourself and the defendant? Which question was also objected to by the state, and overruled by the court. This question was then put by the defendant: Do you know of any other reason than that difficulty of the 11th May spoken of, that existed, or that you had given that evening, or immediately before, why the defendant should make an attack on your person? She says there was no cause of offense given him before that day; she do n't know that Mr. Forsythe was angry with her that day or that even-

ing; defendant had not given any offense that night; no angry words passed that day; all the doors locked that night; was her habit to fasten the windows nights when her husband absent; did not expect her husband would stay all night; after the defendant came in, or very near in, he tapped; thinks it was on the wall after he came in; her husband wanted her to keep still; when partly in he hit his back against the window curtain, and drew back again; felt afraid to stay because the neighbors had been disturbed, and she had been a little herself; neighbors all afraid; and I told my husband if he did not come home that night, I would go to my sister's and stay, with my children.

"Re-examined by the state's counsel: She says that when defendant handed the paper in after her husband had gone, he said to her, *leave that door unfastened*, and immediately went out, and she did not answer; she was flustrated; that she told her husband after his return, that defendant had requested the door to be left unfastened.

"Aurelius Mason, cross-examined by defendant: Says it was a little after dark when he came back; drove pretty fast; it was sundown when he was at Milan; he drove up back alley or street; he frequently did so late, and he turned his horses in his oat-field; delivered the box next morning; left it by white store next morning; took the box and wagon up there; was about eleven o'clock when defendant went to him to get him to go to Huron with wagon; he, witness, made an excuse; told defendant wagon was loaded and out of order; told defendant he could not get back, and was out of money to bear expenses, and defendant gave him one dollar, and told him to tell the landlord, in case the bill was more than that, that he would foot it; took paper with directions *where to carry castings that he was to bring from [28 the mouth of Huron; defendant said he would call and leave the order at his house; did not go into the street that night; set up a little while after back; it was Friday; had kept the horses a few nights previous in the oat-field; two or three nights only; left the goods out all night in the wagon; water would have run in it if it had rained; cloudy; the first he heard of Mr. Forsythe was on the porch; then it was silent; latch might have been lifted once or twice; latch on the door; there was a bed in the kitchen; he went then to square room door; passed by the window in the bed-room; then turned around; no stick under the window; window not in general fastened; is toward Jenny's tavern; window on the east side; bed on the west side, and the head to the porch; twelve lights, 8 by 10 glass, with paper window curtains; one man by the name of Samia, and one by the name of (not recollected), a shoemaker, that was there; not halloo for them; defendant in the kitchen where fire made; threw him down on the floor; had his hands on his head; had his head out of window; supposes the curtain up; saw him when defendant caught hold of covers; did not see him strike her; made quick move after in bed; neither shoes nor hat on; that defendant spoke to him at his gate next morning to take a walk; went to tan-yard; went to bark-house; did not name any sum; did not accept any; thinks did not; defendant on Sunday; witness told defendant it was not for him to settle; met three times on Saturday; had not a conversation at tannery at any time when defendant was called

off; it was before breakfast on Saturday that he talked with Forsythe; saw him in the street; and defendant backward; did not advise with any lawyer to take money; some time in the spring, May last; defendant made an assault on wife, 1832; after she told him, witness, that defendant came to house with paper, he suspected defendant; wife did not tell him anything; the reason that he did not prosecute Forsythe Saturday was that he was sick; took the dollar because he did not know but that he might want it. State rests.

"Defendant called Mr. Horten, who was sworn, and said that he remembered that Mason went to the mouth of Huron river; did not see Mason that night; witness slept in his shop, fifteen feet only from Mason's house.

"Mrs. Peverwell was then called on behalf of the defendant, and was sworn, and the defendant put this question: Do you know that for months previous to the act complained of, there was a general license on the part of Mrs. Mason, for the defendant to visit her in a confidential manner? Which question was objected to, and overruled by the court. This question was then propounded to the witness by defendant: State what you have heard Mrs. Mason say respecting Forsythe's visiting her, in the absence of her husband, privately and confidentially; which is also objected to by the state, and overruled by the court. The defendant then put this question: Do you know, from Mrs. Mason, or otherwise, that previous to the time when this assault and battery was supposed to have been committed, that Mrs. Mason had given Mr. Forsythe a general permission to visit her confidentially in the absence of her husband? Which question was objected to, and overruled by the court, not because the question was a leading one, but because it was incompetent evidence. The defendant then offered to prove by this witness, that Mr. Forsythe had been in the habit of visiting Mrs. Mary Mason, in the absence of her husband, with her consent, for illicit purposes—and this previous to the offense laid. Which testimony the court also precluded from going to the jury, and overruled. Whereupon the defendant rested his cause, and takes exception to all and every of the acts and opinions of the court, in overruling the questions and testimony aforesaid, and in not permitting the defendant to make his defense as he offered to do as aforesaid.

29] "After the argument, the defendant's counsel requested the court to *instruct the jury as follows, as applicable to all but the last count in the indictment: 1. That every assault and battery includes, as an integral part of it, a rude, wrongful, or angry manner; and in this case, if Mr. Forsythe had not a hostile intention—if he merely wished to have illicit intercourse with Mrs. Mary Mason, with her consent, then the intention on his part to commit an assault and battery is barred. 2. That the specific intention of beating this woman must be proved; and that it matters not whether she consented or not, if he acted on the faith of any understanding, or supposition of any understanding, or license, it is sufficient for his justification. Her consent or dissent, at the time of the attempt made, constitutes no part of any crime that can be imputed to the defendant; it is only referable to what his intentions were, and if it had so happened that the wife had given encouragement to Mr. Forsythe before her husband had went away from home, and he came back contrary to her expectation, and she had withdrawn her assent after her hus-

band's return, without the defendant's knowledge, it would operate as fraud on the defendant. 3. If Mr. Forsythe either entered the house, or pulled the clothes down from Mrs. Mason's person, with an intent of committing adultery with her consent, the defendant is not guilty, for his general illegal intentions, or intention to commit another crime than that charged, not amounting to a felony, can not be applied to this specific offense to make out the guilty intention—that rule only applies to felonies. 4. If the window was not fastened, but continued closed only by its own weight, the raising the window by defendant is no breaking open, within the words of the statute on which this indictment is predicated. 5. That it was necessary that the defendant should have entered with an intent to commit an assault and battery, and that that intent should be carried into effect. Which instructions the court did refuse to give to the jury, and did instruct the jury, that each and every of said propositions to be unfounded in law, as applicable to this case. And the court did instruct and charge the jury, that if the wife, Mary Mason, had withdrawn her assent, by reason of the return of her husband, as contained in said second proposition submitted by defendant's counsel, though the defendant acted on the faith of a previous assignation, he was guilty. And the court did further instruct the jury, that if Mr. Forsythe had, previous to the offense charged, a general license from Mrs. Mary Mason to visit her confidentially, in the absence of her husband, or if he visited Mrs. Mary Mason for illicit purposes, in pursuance of a previous license given him by her, that it still made out no justification for the defendant, unless the jury were satisfied that she assented at the time. And the court did also charge the jury, that no previous consent will justify a wrong-doer in presuming or attempting to commit adultery; that he proceeds at his own peril, and if consent is withdrawn, he is criminal if he uses violence. That if there was any unlawful touching of the person of Mrs. Mary Mason by the defendant, without her consent at the time, it was a personal violence, and the defendant was guilty in so doing.

"To all which opinions, charges, and instructions, and to the refusal of the court to charge the jury as desired by the defendant, the said defendant now excepts, and prays the court to sign and seal this, his bill of exceptions."

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*J. Thompson, Adm'r of R. Scoggins, *v.* A. Atherton. [30

The judgment lien is lost, if execution is not sued out and levied within a year, as against a subsequent *bona fide* creditor, where execution is levied within the year.

This case was adjourned from the county of Hamilton. It was a

certiorari to reverse an order of the court of common pleas of Hamilton county, distributing certain moneys, made by the sheriff, upon execution. The controversy arose upon the following state of facts:

At March term, 1824, of the court of common pleas of Hamilton, John Thompson, as administrator of R. Scoggins, recovered a judgment against Joel Scoggins. Upon this, a writ of *fi. fa.* was regularly issued from term to term, the last of which was dated March 3, 1832; and, on the 14th of the same month, was levied on certain real estate of Joel Scoggins, which was legally sold, and produced two hundred and eighty-eight dollars.

The February term of the court of common pleas, for 1832, commenced February 21st, and continued throughout the month of March. At the commencement of this term, a suit was pending in the court of common pleas, A. Atherton *v.* Joel Scoggins. On March 20, 1832, judgment was rendered in the suit against Scoggins. On the 10th of April, execution on this judgment was levied on the same real estate upon which Thompson's execution was levied. Both executions were returnable to August term, 1832.

Upon the return of these writs, that certain moneys were made, both plaintiffs claimed to have each his judgment preferred. On the motion of Atherton, the appropriation was made in his favor. Thompson took a bill of exceptions setting forth the facts, and brought this *certiorari* to reverse the order.

WADE and WOODRUFF, for plaintiff.

STRAIT and HAWES, for defendant.

COLLETT, C. J., delivered the opinion of the court:

In the case of the Urbana Bank *v.* Baldwin, 3 Ohio, 65, this court decided, that where a suit was pending at the commencement of a term, the judgment rendered on any subsequent day of the term related back to, and attached its lien, as of the first day of the term. In that case, Baldwin was a *bona fide* purchaser, after 31] the commencement of the term, but before *the day the judgment was confessed. The lien of the judgment was held to attach against him.

Subsequent to this adjudication, the legislature enacted the law under which this case is presented. Section 2 provides, "that the

lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor, from the first day of the term at which such judgment shall be rendered, in all cases where such lands lie within the county where such judgment was entered." 29 Ohio L. 101. Section 23 of the same statute provides, "that no judgment heretofore rendered, or that may hereafter be rendered, on which execution shall not have been taken out *and levied* within one year next after the rendition of such judgment, shall operate as a lien on the estate of any debtor to the prejudice of any other *bona fide* judgment creditor."

Both these provisions are but transcripts of the statute of 1824, the construction of which has been settled by a series of decisions in this court, in the cases of Urbana Bank *v.* Baldwin, McCormick *v.* Evans, Shuey *v.* Ferguson, and Earnfit *v.* Winans. By these cases it is decided that the execution must be both *sued out and levied* within the year, or the lien is lost if brought into collision with a subsequent judgment, which is so sued out and levied. Thompson's judgment is in this predicament. The levy is overreached by the relation back of Atherton's judgment to the first day of the term wherein it was rendered. The construction of the statute of 1824 was settled upon careful deliberation. By reenacting its provisions, the legislature have sanctioned that construction, and it must be adhered to. The order is affirmed.

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*Burnet *v.* Brush. [32

The act of 1831, for proving and recording deeds, makes a duly certified copy evidence, without accounting for the absence of the original, though the party offering it be the immediate grantee.

Trespass, *quare clausum fregit*, from Trumbull. Plea, not guilty, with a notice that the freehold in the close was in the defendant. At the trial, the defendant offered in evidence a certified copy of the record of a deed from his immediate grantor to himself. The plaintiff objected to this testimony, but the court admitted it. A verdict was taken for the defendant, and the plaintiff moves for a new trial, because the court erred in admitting a copy of the

record of the deed, without requiring the party to account for the non-production of the original.

T. D. Webb and D. Tod, for the plaintiff.

C. Pease, contra, cited 29 Ohio L. 349.

Wright, J., delivered the opinion of the court:

In 1820, the legislature, probably with a view of doing away the necessity of proving the existence of a record, before copies of them were admitted, enacted that copies of records should be *prima facie* evidence of the existence of such records. 22 Ohio L. 222. Under this act, a practice obtained to admit in evidence copies of the record of remote deeds in lieu of the original, but requiring the production of the original deed from the immediate grantor of the party relying upon it, on the supposition that he had in his possession the original deed, which was better evidence of its contents than a copy. Under this practice, we are not aware that any inconvenience was felt, or any injustice done.

In 1831, the legislature, with full knowledge of the practice, changed this law. Section 10 of the act for the proof and acknowledgment of deeds, 29 Ohio L. 349, provides that all copies from the records of deeds, duly certified by the recorder, with his official seal affixed thereto, shall be received in all courts and places within this state, as *prima facie evidence of the existence of such deed*, and as *conclusive evidence of the existence of such record.* The language used here seems to admit of but one interpretation; it is certainly unequivocal. When the law prescribes that such 33] copies *shall* be received as evidence *in all courts and places within this state, there is no latitude for the construction of a court. The competency of the legislature to declare what shall be evidence is not disputed; and it is palpable that body has declared the copy of the record shall be received as such. Although we know not the reason of the change in the law, and might be led to doubt the expediency of it, yet it being the law, we have no choice but to give it effect in the proper case.

New trial refused.

N. TORBET v. G. COFFIN.

An appeal from the judgment of a justice, produced to be docketed in the common pleas, at the second term after it is taken, an objection to its being docketed overruled; issue made, and prosecution to final judgment. It is not too late to revise the order docketing the appeal on writ of error.

Appeal from the judgment of a justice must be docketed at the first term of the common pleas to which it is taken.

THIS was a writ of error to a judgment of the court of common pleas of the county of Fayette. The case presented is as follows:

On March 28, 1828, Coffin recovered a judgment against Torbet, before Samuel Loofborough, a justice of the peace, for seventy-five dollars and costs. From this judgment an appeal was regularly taken, by Torbet, to the next court of common pleas, and perfected before the justice. At the June term, 1828, being the term of the court of common pleas of Fayette county, next succeeding the rendering of the judgment, the appeal was not docketed, or any notice taken of it in court. At the September term, 1828, being the second term, the appellant appeared, and moved to docket the appeal, upon an affidavit of his counsel, that the omission to docket it at the first term was in consequence of an agreement with the plaintiff, that if the appeal was not docketed he would discontinue the suit, or cancel the judgment. The court allowed the appeal to be docketed. Pleadings were proffered, and an issue of fact finally made and submitted to the court for trial, who found for the defendant, and entered judgment accordingly. To reverse this judgment the writ of error is brought, and the principal error assigned was the docketing of the appeal at the second term.

*R. ROBINSON, for the plaintiff in error, contended that this [34 was a case where the terms of the statute were peremptory, and no discretion was confided to the court. He cited 4 Cranch, 237, and notes in 1 Cond. Rep. 260.

No argument was submitted for the defendant in error.

Judge LANE delivered the opinion of the court:

The plaintiff in error, having pleaded to the action, made an

issue and taken a trial on the merits, it is suggested that his objection to the docketing the appeal comes too late. The course of decisions which we have found seems to have established the practice that where the ground of objection appears in the record, and the party has resisted the jurisdiction, as far as he was permitted, his submitting to proceed and try the cause on its merits, does not preclude him from taking the exception in the revising tribunal.

The next question presented is, is it competent for the court of common pleas to place an appeal from the judgment of a justice upon the docket at any other term than that to which the appeal was taken? The court answer this question in the negative. Perhaps cases may occur in which the common pleas ought to allow such appeals to be docketed on a day subsequent to the second day of the term to which they were taken. This would be where, by accident or mistake, and without the neglect of the appellant, or by the contrivance of the appellee, the appeal was not docketed on the second day. For some purposes the term is considered an entire day, and the journal of every day, so long as the term continues, is open to the correction of the court. After the close of the term, it is holden that the court can enter no order *nunc pro tunc*, unless one was actually made, and omitted to be entered. 1 Ohio, 375; 3 Id. 486, 575.

The authority to set aside an irregular judgment, at a subsequent term, does not imply a power to enter a judgment where none existed before. 3 Ohio, 16. Where no appeal is entered at the term next succeeding the day the appeal was taken, the parties are beyond the jurisdiction of the appellate court, and can not be recalled, as the law now stands. The remedy, if a case is made for one, must be sought in chancery. 4 Ohio, 190.

Judgment reversed.

*E. GRANGER'S ADMINISTRATOR *v.* H. GRANGER. [35

Non est factum, in covenant, is a general issue for the purpose of appending a notice of offset under our statute.

In a suit by an administrator upon a claim of the intestate, the defendant may set off any demand of his against the intestate.

When the statute of limitations begins to run against the intestate in his lifetime, it will run to its completion without interruption by the death.

A defendant in such suit can not set off a demand of his against the intestate for money paid after his death by the defendant, upon an obligation entered into in his lifetime as security for him. Such claims look to the general assets for satisfaction.

FROM Muskingum. Covenant upon a sealed agreement between the intestate and the defendant, dated September 1, 1819, for five thousand dollars. E. Granger died in September, 1822, insolvent. Administration was granted upon his estate in August, 1829.

The defendant pleaded *not est factum*, to which he affixed a notice of set-off under the statute. At the trial the plaintiff, having read the contract to the jury, rested. The defendant then offered evidence, under his notice, to prove the intestate indebted to him in his lifetime, upon a book account, for goods sold, work and labor, and money lent. Also, that before the intestate's death, the defendant had become bound, as security for him, to pay certain debts, which he had been compelled to pay since the death. This evidence was objected to by the plaintiff and ruled out.

A verdict was taken for the plaintiff, and the defendant now moves for a new trial.

R. STILLWELL and W. ADAMS, for the defendant, contended that, under the motion, three questions arise for the determination of the court:

1. Can a set-off be given in evidence under the notice attached to this plea?

2. Are the debts due by the intestate barred by the statute of limitations?

3. Can the defendant setoff payments which he has been compelled to make since the death of the intestate, on account of liabilities incurred by him as security for the intestate prior to his death?

The statute on the subject of set-off was clearly intended to give the party the right to make the defense of set-off. It has specified, "that it shall be lawful for the defendant to plead the general 36] issue, and give notice," etc. If there is any such plea *in the action of covenant, it is the one pleaded *non est factum;* and unless a party can give the notice under this plea he can not avail himself of this defense at all against a party who chooses to substitute the action of covenant for debt.

In Oldershaw's Ex'r *v.* Thompson, 1 Stark. 311, Lord Ellenborough says, "The meaning of the words, 'general issue,' in the statute, is a plea that puts the whole declaration in issue." It has never been doubted that under this plea, in an action of debt, the defendant could give his evidence of set-off under a notice, yet this plea puts the same matters in issue in both actions; it does not "put the whole matter in issue in debt any more than it does in covenant." 1 Chit. Pl. 482. If set-off can not be given in evidence, under a notice in covenant, the defendant is driven to his action, and perhaps to bill in chancery, for injunction. By admitting the evidence the court prevent circuity of action, delay, and the accumulation of costs. The English authorities on this subject are contradictory. The case in Starkie decides that the proof can not be received for the reasons above; but in Gower et ux. *v.* Hunt, cited in Bull. N. P. 181, the court held otherwise. But in England a set-off can be pleaded, so that the defendant is not wholly precluded from making this defense, as he will be in Ohio if he can not give it in evidence under a notice. By establishing the doctrine for which we contend, no possible injustice can be done; the statute will be made to operate in all actions; and the equitable purpose intended to be answered by the legislature can not be defeated by a party who chooses to prevent the defense by bringing covenant instead of debt. In Courcier *v.* Graham, 1 Ohio, 155, the court seem to admit that in covenant special matter may be given in evidence under a notice attached to the plea of *non est factum.* That was an action of covenant, and *non est factum* was pleaded, with notice of special matter. The case was strongly contested, and the inference is very strong that the law was then understood by the court to be as we now contend, or the question would certainly have been then made and determined.

2. It is a good reply to the statute of limitations, that there was

no person in being who could be sued. If an administrator had been appointed in 1822, or before the time limited in the statute had expired, the defendant could have brought his action, and the statute could not have been interposed to the claim.

It is true that the defendant could have prevented the operation of the statute by administering himself within the time; but [37 this provision in the law must be construed to confer this privilege on the defendant rather than a right which he is bound to exercise under the penalty of losing his debt. If such were the law, it would give an opportunity for those interested in embarrassed estates to cheat a host of creditors to small amounts; for they would not administer when the receipt of their debts would not compensate them for the trouble and risk of administering. An insolvent estate may hold a specialty against an individual for a large amount; that individual may have credited the deceased to a great amount by book account, on the faith of the debt due by him, which debt is not barred by the statute till fifteen years, whereas the debt due by him is barred in six years. He can be compelled to pay, and could not interpose the statute; but the statute will prevent his offsetting his claim; and this is the very case now before the court. This palpable injustice is not the effect of any default of the defendant.

Besides, in many cases, a creditor may not be able to ascertain whether the balance is against him or not. This may prevent his administering himself. It is true that it is a general rule that when the statute begins to run it continues till the period has expired; but this general rule must have exceptions, and one of the exceptions must be when, in consequence of circumstances wholly beyond the control of the party, there was no person in existence whom he could sue.

It is presumed that if the defendant had been compelled to pay money as security for the intestate during his life, there would have been no doubt of the right of set-off in this action. Does the death of the intestate after defendant had become his security, and before payment of money as security, and the insolvency of the estate, prevent the set-off? By the provisions of the statute of set-off it certainly does not; for although the payment was not made until after the death of the intestate, yet after it was made it became as much a debt due by the plaintiff, in his representative character, and in that by which he prosecutes this action, as

though made in the intestate's lifetime. It will, however, be contended for the plaintiff that the policy of our law requires that the creditors of an insolvent estate should receive payment in ratable proportion. Such, we admit, is the policy of the law, when all the creditors at the time of the death stand in the same situation. But this policy does not extend to produce injustice. It would no 38] doubt prevent the debtor *from setting off a note of the intestate after his death. To authorize a set-off, under those circumstances, would enable a debtor of an insolvent estate, after the death of his creditor and after the insolvency was discovered, to pay his debt by purchasing claims on the estate at a rate proportioned to the rate of insolvency. But when the defendant, in the lifetime of the intestate (and perhaps relying on the debt due by him as an indemnity), becomes security for, and, after the death of the intestate, pays the amount of the debt for which he became security, these reasons do not exist—no injustice is produced. The policy of the law is protracted as far as justice requires, and the statute of set-off would have the operation which the provisions require.

The English law of distribution requires that debts of a higher shall be fully paid, to the entire exclusion of those of a lower degree. By the argument that the policy of our laws for the equal distribution among all the creditors would prevent a set-off of the kind under consideration, the policy of the English law would prevent a simple contract creditor of an insolvent estate from any set-off, even that which existed at the time of the death of intestate; for a set-off in that case would go to lessen the fund for the payment of the specialty creditors, and is so far entirely opposed to the policy of their law. I have not been able to find any case of the kind, or such a principle asserted in any elementary book. If the general principle of set-off for which we contend existed, we would not expect to find such a case; but if the exception to the general rule existed, as claimed by plaintiff, it would certainly be recognized in the elementary treatises, and supported by cases in the reports. We infer, therefore, that the general law of set-off has not been disturbed, and that in a suit by an administrator in England the defendant is permitted to set off, without reference to the degree of his claim. Bankruptcy and the cases under it are strictly analogous to this case. The declared object of the bankrupt laws is to make an equal distribution of the prop-

erty. If the argument of the plaintiff is correct, this policy would extend to all debts which were not due at the time of the bankruptcy. Yet it has been denied that a demand arising upon an instrument, payable after the bankruptcy, may, if made before, be set off. Ex parte Prescott, 1 Atkins, 231; Smith *v.* Hadson, 4 Term, 211; Atkinson *v.* Elliot, 7 Term, 371.

*C. B. GODDARD, for the plaintiff, in reply, argued as follows: [39

The first question made by defendant's counsel is one of practice purely, and I will not trouble the court with any remarks upon it. The authorities we rely upon are 1 Stark. 311; 2 Chit. 388.

2. The statute of limitations. As the counsel for defendant do not attempt to withdraw from the operation of the statute any cause of action which subsisted during the lifetime of Ebenezer Granger, little need be said respecting those. There was a person *in esse*, who could be sued—to wit: Ebenezer Granger himself. The statute began to run; and the authorities are uniform, that once begun to run, nothing stops it.

The counsel have an ingenious mode of disposing of an objection where all the authorities are against them. They reason thus: these authorities establish a general rule; there is no general rule without exceptions; and we find no exception hereto—*ergo*, the present case is an exception.

Upon the trial in the county, an idea was suggested, that as Ebenezer was more largely Henry's creditor than debtor, Henry had no inducement to sue, and that, therefore, the statute ought not to run against him. There was a period in the judicial history of the act of limitations, when the shallowest circumstances were seized hold of to take a case out of its operation. Yet even then, was the circumstance now relied on supposed to possess any weight? It was never urged, for it is without foundation. The statute of limitation proceeds not merely upon a presumption of payment, but upon the loss of evidence. If I hold a bond against a man for a large sum, and become indebted to him for work, goods, etc., it is his duty to present his account, and either receive payment or have it indorsed upon the bond; and if, without taking any such steps or suing, or obtaining an acknowledgment, he wait six years from the time his right of action accrued, the statute will protect me from the demand; and I need not ask the court to presume either that the debt is paid or that I have lost my receipt. *The*

statute stands in the place of presumptions; and it is equally effectual whether, without it, the presumptions would or would not exist.

But, in point of fact, Henry Granger's claims against Ebenezer, as now set up, were not, at the death of Ebenezer, greater than Ebenezer's against him.

Again, the fact should not be lost sight of, that Henry Granger was appointed executor, and declined. "Where the executor 40] *became possessed of his testator's goods in 1792, but did not obtain probate of the will till 1802, it was held that the statute run against a creditor of the testator from the year 1792, because the executor might have been sued as executor *de son tort.*" Webster *v.* Webster, 10 Ves. 93. It is said to be hard to apply the statute in this case. Certainly no harder than to make it run in an action for a tort from the time the wrong was done, and not from the time the damage is ascertained, a principle universally acknowledged. He cited also 6 Bac. Ab. 136; Bull. N. P. 180; 1 Yeates, 391; 3 Marsh. 236; 3 Bibb, 49.

3. Set-off. The defendant's argument upon this point is limited to those debts which arose after the death of E. Granger, and I will so limit mine.

It is claimed that, because the sums which Henry paid after Ebenezer's death were paid in consequence of a contingent liability in his lifetime, they may be properly set off in this action without disturbing the course of administration. Analogies are attempted to be drawn from the English law respecting the dignity of debts and the English statutes of bankruptcy. As to the first, I am ignorant of the principle asserted by the counsel. As to the second, it is well known that bankruptcy cases are *sui generis*, governed by their own peculiar law, and not often used to illustrate other branches of the science. I am not clear that the defendant has a right to join (in this his cross action against the plaintiff) debts due from the intestate with debts due from the administrator, even though due as administrator. But if unobjectionable on this score, where is the authority to be found to show that such a set-off can be admitted? Can any case be shown, where a note falling due after the testator's or intestate's death, the holder can use it as a set-off, and thereby obtain full payment, while other creditors receive but their proportion? But the present case is not so strong as that. H. Granger's liabilities were merely contingent and collateral. In the natural order of such debts, the

creditor would present it to the administrator and receive his distributive share, and would call upon the surety for the residue. H. Granger's loss will be no greater, if this set-off be rejected.

It was agreed by counsel, that there was no evidence to be offered in case of a new trial, except that offered at the trial and rejected, and if the evidence was inadmissible, no good would result to the defendant from a new trial.

*WRIGHT, J., delivered the opinion of the court: [41

1. Is *non est factum* a plea of the *general issue* in covenant, to which a notice of set-off can be appended? The act allowing mutual debts and demands to be set off, 29 Ohio L. 121, authorizes defendants to plead the "*general issue*," and at the same time to give notice of offset. It is admitted that in strict legal contemplation, there is no general issue in covenant. According to the common rule, the general issue *must* put the whole declaration in issue. *Non est factum* in this case only puts in issue the execution of the covenant. The decisions upon the precise questions are contradictory. 1 Chit. Pl. 561; 1 Stark. 311; S. C., 2 Chit. 388; 1 Chit. Pl. 482; Bull. N. P. 181; 1 Ohio, 155. The practice which has generally obtained in our courts, ever since the passage of the law allowing notices of set-off to be affixed to a plea of the general issue, has regarded *non est factum* in covenant as a plea of this general issue within the meaning of the legislature. This construction given to the law, from its enactment, by those called to construe it at the bar and upon the bench, is evidence of its meaning, not to be overlooked. Courcier & Ravesier *v.* Graham, 1 Ohio, 348, was covenant, in which was a plea of *non est factum*, with a notice of set-off. Several counsel of high standing in the profession, and of long and extensive practice, were engaged in that case, yet no objection was made on that account; and the late distinguished chief judge (Hitchcock), in pronouncing the decision in the case, says, "the principal object of pleading *non est factum*, seems to have been *to lay the foundation for giving notice.*" These evidences of the meaning of the legislature, in using the terms "general issue," united with our belief, that the construction which admits the notice under the plea accords with the spirit and intention of the act and our liberal practice, bring us to the conclusion that the notice may be affixed to the plea, and proof adduced under it.

2. The next proposition we are called to decide in the case is,

whether, in a suit by an administrator, upon the claim of his intestate, it is competent to set off a demand due from the intestate to the defendant? The statute, 29 Ohio L. 121, authorizes a set-off "of any debt, contract, book account, or other liquidated demand against the *plaintiff*." The term *plaintiff*, as used here, is understood to describe the party whose rights are sought to be enforced by the suit. The act is designed to allow mutual debts to be set 42] off, one against the other, to avoid circuity *of action. For the purposes of justice, it regards one of the demands, to the extent it goes, as extinguishing the other, and provides a judgment for the balance really due. As, therefore, the administrator is pursuing the rights of his intestate, the claim to set off a demand due from the intestate to the defendant is, between the same parties, mutual, and, in our opinion, founded in the law. The coming in of an administrator, by operation of law, to enforce the claim of the intestate, does not change its nature, nor violate the settled rule, that the claim to be set off must be between the same parties. See also 6 Taunt. 448, 453.

3. Are the claims offered to be set off barred by the statute of limitations? It is agreed by the counsel that E. Granger died in September, 1819. This suit was commenced in 1832, a period of thirteen years after the cause of action accrued. The right to sue for such claims is limited by our act to six years. The same limitation is supposed to apply to set-offs as to actions. But it is urged that the statute, not having run to its completion in the lifetime of the intestate, was suspended by the death, and only commenced running again when administration was granted; since which, six years have not elapsed. We think it well settled, in ordinary cases, that where the statute of limitations once begins to run upon any subject, it continues to run to its completion, unless interrupted by some act of the party setting up the statute, which places the claim within some of the exceptions provided in the act. The death of the debtor is not such an act, and does not interrupt the running of the statute; nor does the delay in taking out administration. If a creditor would save his debt from the statute bar, he should take out administration himself. We do not feel called upon to consider the effect of the fact urged, that the defendant was appointed executor in the will of the decedent, but declined to prove the will, or qualify as executor.

4. The next question propounded to us is: In a suit by an ad-

ministrator, upon his intestate's claim, can the defendant set off a demand for money paid after the death of the intestate upon a liability entered into by the defendant, as surety for the intestate? Our judgment resolves the question in the negative. No cause of action or demand against the intestate existed against the intestate at his death. A liability only was incurred, upon which, on the contingency of the security being compelled to pay for the intestate, he would have a right of action for his indemnity. A *bare possibility, that in a certain [43 future contingent event, he would have a demand, is not a debt due from the intestate, and such claim has not the mutuality required for a set-off. Such a demand, though good against the estate, can only look to the general assets for satisfaction. To allow it to be offset, would change the course of distribution of intestate estates. The hardships expected to result from the rejection of this set-off can have no weight with us, unless the law opens the door for their redress.

The result of our opinion would be to award a new trial, because the evidence was ruled out under the notice, but as the parties agree there is no evidence to offer, which is admissible under the points decided, the motion is overruled, and judgment entered on the verdict.

JOHN GOODRICH *v.* HENRY W. JENKINS.

The plea of *nul tiel record* to an action on a judgment of a sister state, draws nothing into controversy but the existence of that record.

Matter properly to be investigated in the original case, in an action on a judgment in a sister state, can not be drawn into controversy in Ohio.

THIS cause came up from the county of Huron. It was an action of debt, founded upon the transcript of a judgment rendered by the court of common pleas of Tompkins county, New York, at the suit of the plaintiff against the defendant. The declaration was in the usual form.

The defendant pleaded several pleas:

1. *Nul tiel record.*

2. In substance, that the judgment set out in the declaration was rendered on a penal bond for two thousand dollars, with a collateral condition to pay one thousand dollars in saddlery,

at cash price; that the judgment was taken by default; that by a statute of New York, in force when the judgment was rendered, it was provided that upon a judgment by default, on a penal bond, conditioned for the performance of some collateral matter, breaches should be assigned on the record, and damages should be assessed on the breaches for such amount as it should be proven had been sustained; that in this case no such breaches had been assigned, but that the judgment was for the whole penalty.

44] *3. The same matter as the second, with the addition that the consideration of the bond upon which the judgment was rendered, was the sale and conveyance of a tract of land, the title to which had failed before the rendition of the judgment, with an allegation that four hundred dollars had been paid upon account of the condition of the bond.

4. That before the rendition of the judgment, the defendant paid the plaintiff six hundred dollars, in payment of the condition of the bond, that no breaches were assigned on the default, or damages assessed, but judgment taken for the entire penalty. A notice of set-off was also put in.

The plaintiff joined issue, on the plea of *nul tiel record*, and demurred to the other pleas. The whole case was submitted to the Supreme Court of Huron county, at the last term, and adjourned here for decision.

No argument was furnished on either side.

COLLET, C. J., delivered the opinion of the court:

A judgment of a court, in the State of New York, is of the same force here that it is in the court where it is rendered. The judgment now before us, being rendered by a tribunal of competent jurisdiction, is doubtless final and conclusive between the parties until set aside or reversed, according to the regulations of the jurisdiction where it was rendered. 7 Cranch, 483; 1 Ohio, 261; 5 Ohio, 546.

The first plea in bar shows that very probably the judgment is irregular or erroneous; but judgments of this description are held conclusive between the parties, on the subjects involved, wherever the court had jurisdiction, whilst they remained unreversed. 3 Ohio, 306.

The second plea in bar presents the additional question, that before the judgment was rendered, the consideration of the bond had

failed. In New York, this matter could not have been pleaded in bar, to the action at law on the bond. But if it could, it was matter to be investigated and decided, antecedent to the rendition of the judgment. No such matter can be examined into, in an action on the judgment.

The other pleas in bar amount to nothing but a partial payment made on the bond, before suit brought. This would have been no bar to the original action; nor can partial payment be pleaded in bar to an action on the judgment itself, if actually *made upon [45 it. Part performance is no answer to any action. It can only prevail in adjusting the actual amount due, or in the character of accord and satisfaction, in which it is not pretended to be here used. The rule is inflexible in this country. In an action upon the transcript of a judgment, in a sister state, nothing can be pleaded or proved, that could have been pleaded and proved in the original action, whether it was so pleaded and proved or not. The demurrers are sustained, and the pleas in bar overruled.

Upon the plea of *nul tiel record*, the court find for the plaintiff, for whom the judgment must be entered.

PHILEMON BROCKWAY *v.* RALSA CLARK.

Where a money-lender takes from a borrower an obligation for a greater amount than the money lent and the stipulated interest, with an undertaking on his part to receive a less sum in discharge of the obligation if punctually paid, chancery may relieve against the excess as a penalty.

IN chancery, from Trumbull. The bill makes the following case: That the complainant being pressed for money in October, 1827, applied to the defendant to lend him one hundred dollars. The defendant, knowing the complainant's embarrassment, and that he had a good farm, fraudulently contriving to extort from him an unconscionable bargain, loaned him the hundred dollars for ninety days, and took from him a note for one hundred and thirty dollars, with a condition inserted in it, that if it was paid within the ninety days, one hundred and ten dollars should discharge it. The complainant, when the note fell due, made application to

the defendant to continue the loan for ninety days longer, which was agreed to, and a new note given, for either one hundred and fifty or one hundred and sixty dollars, conditioned that a less sum should discharge it, if paid within the time. When this note had run its time, the complainant applied to the defendant to continue the loan another ninety days, which was acceded to, and a new note given for two hundred and sixteen dollars, conditioned, as before, that a less sum should discharge it, if punctually paid. The complainant paid, on this note, thirty dollars in September, and thirteen dollars in December, 1828. The residue remaining 46] *unpaid, the parties entered into a new agreement, in pursuance of which, the complainant executed to the defendant three notes under seal; one for seventy-two dollars, on demand, one for seventy-two dollars and forty-two cents in sixty days, and the other for seventy-two dollars and twenty-one cents at four months. In June, 1829, the complainant paid forty-five dollars; after which the defendant commenced several suits before justices of the peace, for the balance due on the notes, and recovered judgments, which were appealed by the complainant to the court of common pleas, where the suits are still pending. That, reckoning interest at the rate of six per cent. per annum, upon the money borrowed, there remained, at the filing of the bill, less than thirty dollars due to the defendant. The complainant has not the notes which have been paid off, and charges that the defendant has fraudulently retained them. The bill prays that the defendant may be compelled to give up the notes paid off; to accept the balance of principal and interest at the rate of six per cent. upon the money loaned; be perpetually enjoined from collecting the residue; and for general relief.

The defendant answers, denying all the fraud and extortion charged against him, and the possession, detention, or knowledge of the notes paid off. To the residue of the bill he demurs generally.

GIDDINGS and WADE, for the demurrant, made two points:

1. That the several contracts set forth in the bill having been entered into by the parties, with a full knowlege of their rights, in contravention of no law, can not be avoided in equity, without fraud or covin.

2. The court can not, as is prayed for in the bill, *make* and

carry into effect between these parties, a *new contract*, which neither of them ever intended to enter into.

C. Pease, contra:

It is urged in support of the demurrer, that the legislature, by the repeal of the usury act, had left it entirely to the discretion of men to take such bargains as they please, in relation to the use of money, without being subject to any restraint by the courts of law or chancery; that the complainant acted with his eyes open, and was without the aid of chancery, etc.

I have a different view of the intention of the legislature. *They have certainly established what they considered to [47 be the fair and just rate of interest at six per cent. per annum, and *no more*. Under this act, the Supreme Court in Hamilton county decided, in a suit brought upon a note, promising to pay three and a half per cent. per month, amounting to forty-two per cent. per annum, that they would compute (in the words of the statute) six per cent. per annum, and *no more*.

I have supposed that the legislature intended to fix the rate in computing damages, remove all pains and penalties, and leave people at liberty to contract as they please, subject, however, to the same rules and regulations which govern other contracts in cases of fraud or oppression. Although some lawyers insist, that as the law has fixed the boundary, beyond which we can not pass, and as it is contrary to the letter and policy of the law to pass that boundary, such a contract would be illegal and void, and should be so treated by courts of law and chancery. I, however, have considered such contract good for the true consideration, and, under some circumstances, for the legal interest also.

I can not entertain the supposition, that while the courts of chancery protect us against fraud and extortion in ordinary contracts, and daily set them aside where the fraud is evidenced principally or entirely by the inadequacy of consideration, that in mere money transactions, weak and necessitous persons are to be left entirely to the mercy of usurers, grinders, and extortioners. If they are to be our lawgivers, woe betide us.

I shall, therefore, consider this cause as depending upon the same principles as other cases of fraud and extortion, evidenced by inadequacy of consideration. I am aware that a rule is laid down in the books, that for inadequacy of consideration merely,

without some other circumstances, a contract will not be set aside; but where the inadequacy is so gross that a man will readily exclaim against it, *very slight* circumstances will be sufficient to consummate the evidence of fraud, and it can not be disguised that in many instances those *slight circumstances* exist more in the imagination than in the vision of the court.

Book rules should undoubtedly receive a due share of veneration, although they may many times appear illiberal and contracted, and, in the opinion of some, should be got round, rather than met by other rules more just and equitable, but where the 48] inadequacy is so monstrous that even Mammon himself *would be ashamed of it, we may, without any great violence to rule, pronounce it fraud *per se*, and as rationally as in other cases conclude that the party cheated was so weak in mind, or under such embarrassments and distress, and so completely within the power of his oppressor, that he could not exercise his judgment, if he had any; and I confidently hope that this court will adopt and apply this new rule, or manufacture one as efficacious.

So far as I can gather from cases, what may be termed a standard rule of such inadequacy as would be deemed presumptive evidence of fraud, is, where the thing sold is worth double the price, or the price double the value of the thing sold, although there are many cases where the courts have rescinded contracts when the inadequacy was less, and refused where it was more, according to the attendant circumstances.

Reasoning, then, from analogy, if six per cent. per annum is the fair price for the use of money, twelve per cent. would be gross, twenty-four per cent. monstrous, fifty per cent. outrageous, and one hundred and fifty-five per cent. (about the rate exacted by the defendant for the first nine months) beyond endurance. If any case can be presented to the court carrying internal evidence of rank oppression, this is one. It is a fit companion for the case of the sale of a horse for a penny a nail, doubling each to thirty-two. Where the subject matter is sufficient of itself, circumstances are useless companions.

It may be said that here were several distinct and separate contracts; that no one of them was so very outrageous; and the court must look only to the last. To this I answer, that each contract was bad enough, but they must be taken together as parts of a systematic operation. It makes no difference, in the eye of jus-

tice, whether a man is ruined by a single transaction, or a systematic course of oppression continued for months or years, whether he be devoured by mouthfuls, or swallowed at a single gulp.

The great question is, will our judicial tribunals afford any protection to the weak and necessitous against their oppressors, or must the legislature again resort to usury laws? When the avarice of man is insatiable and knows no bounds, and no legal restraint is laid upon his cupidity, the evil of extortion, which has already risen to an alarming height, will soon become intolerable. It already cries aloud for reform. The public should be made acquainted with their situation.

*The equitable statement of the case stands thus: [49

The complainant, in October, 1827, borrowed		$100 00
Interest to October, 1828		6 00
		$106 00
Payment in August or September, 1828	$30 00	
Interest on do. to October, say	15	
		30 15
Balance		$75 85
Interest on balance to October, 1829		4 73
		$80 58
Payment in December, 1828	$13 00	
Interest on do. to October, 1829	65	
		13 65
Balance		$66 93
Interest on balance to October, 1830		4 02
		$70 95
Payment, June 12, 1830	$45 00	
Interest on do. to October 1830	90	
		45 90
Balance due October, 1830		$25 05

But defendant claims upon his last three notes, after deducting the payment of forty-five dollars in June, 1830. $183 73
Making the trifling difference of $158 68
0

Loomis and Metcalf, on the same side, contended that this

transaction was characterized by a degree of injustice and oppression, which must at first blush shock the feelings of every good citizen, its terms being so extremely inadequate as to satisfy the conscience of the court, that there must have been imposition upon the complainant, or that species of pressure upon his distress, which, in the view of equity, amounts to oppression; and that from the intrinsic unconscionableness of the demand, fraud would be presumed, to give the court jurisdiction, and require of it to order the instrument to be delivered up. They cited 2 Swift's Dig. 47; 14 Johns. 559; 5 Ohio, 472; 2 Vern. 14, 121, 402; 1 Atk. 301; 1 Bro. C. C. 1, 558; 2 Bro. C. C. 167; 10 Ves. 219; 13 Ves. 103; 14 Ves. 214; 4 Des. 651, 697.

50] *WRIGHT, J., delivered the opinion of the court:

The denial by the defendant that he had any knowledge of the complainant's embarrassments, of the use of undue means to induce the loan or its continuance, and of all fraud in the transaction set out in the bill, presents this case to us upon its intrinsic merits, as shown in the nature of the transaction, unaccompanied by the ordinary tests of jurisdiction. But if resort were had to the evidence filed to do away the answer, the result would be the same.

The case presented is one between an avaricious money-lender and an improvident borrower, and exhibits, on the part of the lender, an appetite for gain too insatiable and greedy to rest satisfied with ordinary acquisitions. It is pressed upon our consideration as one showing a ruinous and unconscionable bargain between the parties; one that the complainant should be relieved against, as fraudulent *per se*, because the inadequacy of compensation for the money loaned is so gross as to shock every correct mind. The ruinous tendency of borrowing considerable sums where such rate of interest is exacted and paid for any length of time, is sufficiently apparent to any one. The hundred dollars loaned, in this case, is increased in less than two years and a half to two hundred and fifty-nine dollars and sixty-two cents—*one hundred and sixty per cent.*—an amount so repugnant to our sense of propriety, as to induce a strong inclination to relieve against its payment; but we must take care that our feelings do not lead us to overleap the rules which govern courts in such cases.

Until the year 1824, we had a statute fixing the rate of interest at six per cent. per annum, and providing punishment for usury. This law was held to make void so much of contracts as stipulated for more than the legal rate of interest; and under it our courts were in the practice of enjoining from collecting the excess, where the debtor tendered the amount of principal and lawful interest due. But the tender of the sum admitted to be due, and the bringing it into court for the use of creditors, was commonly held an indispensable requisite to the chancellor's interference. The maxim, "he that seeks equity, must first do equity," was deemed applicable to that class of cases. The bill before us contains no such offer, and the complainant does not in any way bring himself within the strict rule. He avers only that he is willing to pay the balance as the court *may direct, and leaves his case [51 embarrassed with difficulty, on account of his departure from correct practice.

The general assembly, in 1824, repealed the law against usury, and enacted in its stead the present law, fixing the rate of interest upon all moneys, after the same shall become due, at the rate of six per cent. per annum, and no more. 29 Ohio L. 151. It is contended, for the complainant, that the only change effected in the interest law by this last act, is one of phraseology, the substantial enactment of both being the same. We do not think so. The two acts differ in very essential particulars. In the former, any person demanding or receiving "more than six per cent. per annum, on any contract, debt, or demand whatever," forfeited "the whole amount of the debt on which such illegal interest was charged or received," one-half to the county, and the other to the person prosecuting. See act of December 29, 1804, 1 Chase's Stat. 484. The act of 1824 contains no provision forfeiting the debt, nor any one prohibiting the contracting for, or the receiving, any rate of interest. The first was entitled "an act fixing the rate of interest, and *for preventing usury;*" the last simply "*an act fixing the rate of interest.*" These differences clearly indicate that the assembly, in the two enactments, had not the same object in view. The change of the law presents this class of cases before a chancellor in a new light.

The distinguished counsel for the complainant, feeling the difficulty and novelty of this case, urge their claims to relief upon the ground that the contract is hard and unconscionable; and claim

that, being open, it may be relieved against or rescinded. We feel the truth of the assertion, that these contracts are hard and unconscionable; and if our aid was sought to enforce their performance, we should not hesitate to refuse it. Yet, as no portion of these contracts is against law, the usual way of restraining against the illegal part of the contract, upon the party bound coming forward and paying what is legally due, is not open to us. To declare a contract for more than six per cent. per annum interest void, would be to go beyond the legislative provisions on the subject; and to impose a penalty upon such contracts would set up again that which the legislature has taken away. Such a course would draw to chancery, from the legislature, to whom the subject peculiarly belongs, the power of fixing the rate of interest and defining and punishing usury. Whatever gratification, 52] therefore, as individuals, we might feel *to be able to relieve against such enormous interest, we do not find the authority, as a court, to do so on either of the grounds pressed in argument.

The case is susceptible of one other view, the result of which may be more to the complainant's advantage. It comes within one of the ordinary heads of chancery jurisdiction to relieve against penalties affixed to legal contracts, which the rules of proceeding in courts of law enable parties to exact. Accustomed as chancery is to exonerate parties from penalties and forfeitures, we shall pursue an open track, if the case in hearing afford opportunity to apply such relief. The transactions between these parties disclose the fact, that in the first note for one hundred and thirty dollars, there was an agreement that one hundred and ten dollars, paid before the stipulated time expired, should discharge it. We are disposed to regard this as a penalty, inserted in the contract, in order to compel its punctual performance, and to relieve against it upon the same principles parties are ordinarily relieved from penalties. All the changes made in this contract since it was first entered into, we understand retain the same feature, although the case does not disclose the exact amount of penalty in any of the obligations except the first one. In taking measures to exonerate the complainant from these penalties, we contravene no provision of our interest law. It is due to the subject to say we should have been better satisfied if the complainant had proffered payment of the money due, and if refused, had brought it into court; but the case admitted by the demurrer is so strongly marked, and the ex-

actions for the use of the money so scandalous, that we are induced, without intending to establish a precedent, to overlook the omission; and we the more readily do this, because the defendant has gone to a hearing of his case without raising any objection on this account. See 3 Munf. 397.

The case will be referred to a master, with instructions to proceed on short notice to take an account showing what proportion of the three last notes mentioned in the bill is for penalties, and how much is still due the defendant, allowing the stipulated rate of interest on the sum borrowed, and deducting the payments as of the date when made. The complainant is required to pay the amount so found to the master for the use of the defendant, within thirty days after the account is completed; and also to pay the costs accrued in the suits at law; but if he fail in these payments, the injunction heretofore allowed will, from the *expiration [53 of said thirty days, stand dissolved. For the coming of the report of the master and further proceedings, the cause is continued.

T. Baker v. H. Black and others.

The law regulating common schools does not authorize levying a second tax within three years, in consequence of changing the boundaries of the district, where the tax exceeds one hundred and fifty dollars, and the owner and more than one-third of the householders taxed are non-residents.

This cause was adjourned here for decision from the county of Huron. It was a bill in chancery, the object of which was to enjoin the collection of a tax levied for the erection of a school-house. The bill stated that the complainant owned five entire lots of ground, and the half of a sixth lot in the township of Ridgefield, in the county of Huron. That the lots, No. 1, No. 12, and the half-lot, No. 13, on February 4, 1826, were situate in school district No. 1, in the township of Ridgefield, and the others were in school district No. 2, of the same township. That in August, 1829, in school district No. 2, a tax was assessed, and levied, and collected, for the erection of a school-house, at which

time the lots in that district, 16, 17, and 20, were assessed, and the assessment paid. That in March, 1830, the boundaries of the school districts were changed, so as to include lots 16, 17, and 20 in district No. 1. That in November, 1831, a part of the inhabitants of school district No. 1, assessed a tax of two hundred dollars on the district for the erection of a school-house, and apportioned a part of this tax on the lots 16, 17, and 20, assessed for the same purpose, in 1829, in district No. 2. That at the time of making this assessment, there was a good school-house in district No. 1, where it was proposed to erect the new one. That the complainant did not reside, and never had resided, in Ridgefield township. That more than one-third of the land assessed to raise the tax of two hundred dollars, was owned by persons, who, at the time the tax was levied, resided out of the district. That the defendant, Morse, appointed treasurer of the school district, was proceeding to collect the tax upon the lots 16, 17, and 20, and had made a seizure of property for that purpose. The whole proceedings were claimed to be illegal, and an injunction prayed for, to stay them, as also a 54] *prayer for general relief. There is a general demurrer to the bill.

COLLETT, C. J., delivered the opinion of the court:

The statute to provide for the support of common schools gives jurisdiction to this court in cases like the one presented by this bill. Sections 13, 14, and 15 of that statute provide that where less than two-thirds of the property subject to taxation, in a school district, is owned by persons residing within it, no single tax exceeding one hundred and fifty dollars shall be levied by the inhabitants to erect, repair, complete, or furnish a school-house; that no land of a non-resident of the district, once taxed to erect, repair, complete, or furnish a school-house for the district, shall, by any alteration of its boundaries, be again taxed for the same purpose until the expiration of three years.

The facts shown in the bill bring the complainant's case clearly within two of the statutory provisions here enumerated. The assessment exceeds one hundred and fifty dollars; the lots in question belong to a non-resident, and had paid tax for the same purpose within the last three years. The fact that the defendant and more than one-third of the landholders to be taxed are non-residents, being charged in the bill, are admitted by the demur-

rer. The tax is clearly illegally assessed. The complainant appears entitled to the relief he seeks. The demurrer is, therefore, overruled.

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*William Davis v. Samuel P. Herrick. [55

In a suit by an indorser against the maker of a promissory note, the question of due diligence, where the facts are not disputed, is one of law to be decided by the court.

Where the facts are contested, the question of law becomes mixed with fact, and is for the decision of the jury, under instructions from the court, upon the hypothetical state of facts claimed to be proved.

As to negotiable paper strictly commercial, such as that on its face negotiable at banks, the act of Ohio, of 1820, makes no change in the rule of the law-merchant.

A demand of the maker of a negotiable note, and notice on the ninth day after the note arrived at maturity, is not the use of due diligence to charge an indorser.

From Muskingum. Assumpsit by the plaintiff as holder and indorsee of the defendant of a promissory note, payable on April 10, 1832, made by one Wall. Plea, *non assumpsit*.

During the progress of the trial on the circuit, the following facts appeared in evidence in reference to the demand of the maker and notice to the indorser, to wit: That Wall resided in Zanesville. He left there with a drove of horses for an eastern market in February, 1832, expecting to return in six or eight weeks (before the note fell due), but has never returned. Upon the day the note was payable, or the day after, the plaintiff's servant, by his direction, inquired at Wall's house if he was at home, and was informed by the family he had not returned, but would be home in the course of the week. Six days after the note fell due, the servant made a similar inquiry, and received for answer that Wall had not arrived, but would be home that week or the following one. The eighth day after the note fell due, the servant again called at Wall's house, but neither he nor his wife were at home. On the next day the inquiry was renewed at Wall's house, when his wife replied that he had not yet got home. The servant then presented

the note to the wife and demanded payment, which being refused, it was on the same day presented to the defendant for payment, with information that Wall could not be found. The defendant refused to pay or take up the note, remarking that Wall would be at home in three or four weeks and pay it. It appeared also that one Ballentine, a citizen of Zanesville, being in Philadelphia when Wall was there, became suspicious he would not return home. About the 1st of April, Ballentine mentioned this subject to the sheriff of the county, and the sheriff, on the 2d of April, communicated these suspicions to the defendant. Upon this state of fact, two questions were made to the court, whether the plaintiff, under the circumstances, had used *due diligence*, under the statute, so as 56] to entitle him to recover of the *indorser, and whether the question of diligence was for the court or jury? The court decided that what constituted due diligence was a question of law for the court, and instructed the jury that the demand and refusal in the case did not make out the due diligence upon which the plaintiff's right to recover depended, and, therefore, they ought to find for the defendant. A verdict was so returned.

The plaintiff moves for a new trial, "because the court erred in charging the jury that due diligence had not been used to charge the indorser."

GODDARD and CONVERSE, for the motion, contended:

1. That the statute of Ohio has materially altered the commercial rule as to the steps necessary to charge an indorser of a promissory note.

2. That under that statute the question of diligence is a question of fact to be determined by the jury.

3. That due diligence has been used in this case. The consideration of this point will, of course, be unnecessary, if the two first be established in our favor.

1. As to the change effected by our statute.

Section 2 of the "act making certain instruments of writing negotiable," passed February 25, 1820 (vol. xxix, 217), provides that the indorsee may sue the indorser, "having first used due diligence to obtain the money of the maker."

Section 5 provides, "if any indorsee of a note made negotiable by this act, on trial of any suit instituted thereon, against any indorser, shall prove a demand made of the maker, at the time the

same became due, *or within a reasonable time thereafter*, it shall be adjudged due diligence under section 2 of this act."

Under the act of January 25, 1810 (1 Chase's Ohio Stat. 660), it might have been contended that the commercial rule was not altered, that statute requiring an indorsee to use due diligence, but not attempting to define in what that due diligence consisted.

Under the act of 1810, we are willing to permit our opponents to contend that an indorser is not liable, unless payment be demanded of the maker *on the day* the note becomes due, and notice of non-payment be given to the indorser on that day or the day following.

That is the commercial rule.

"A bill or note must be presented for payment on the very *day on which it becomes due." Bayley on Bills, 149, chap. [57 7, sec. 1, Boston ed. 1826.

"In this country (England), upon the last day of grace, and within a reasonable time before the expiration of that day, a bill or note must be presented for payment." Bayley on Bills, 153.

So Marshall, Chief Justice, in the case of Lenox et al. *v.* Roberts, 2 Wheat. 373, "It is the opinion of the court that the demand should be made on the last day of grace."

So in New York, Johnson *v.* Haight and Matthews, 13 Johns. 470, by Spencer, Judge, in delivering the opinion of the court: "The law is perfectly settled that a note must be demanded on the third day of grace, unless that day falls on Sunday, and then it must be demanded on the second day of grace."

But the statute of 1820 changed all this. When the legislature say that demand *may* be made on the day the note becomes due, *or within a reasonable time thereafter*, have they not changed the commercial rule which says the demand *must* be made on the *very day* the note becomes due?

The commercial rule says, demand within a reasonable time after the note becomes due, and you shall *not* recover. The statute of Ohio says, demand within a reasonable time after the note becomes due, and you *shall* recover.

With respect to the time within which demand must be made, the statute has, then, materially changed the commercial law. Has it not changed it also in another important particular, by its entire silence as to notice to the indorser? The legislature has

prescribed the condition upon which an indorser shall be held liable. They require the holder of the note to do a certain act to entitle him to recover. Can the court superadd the obligation of giving notice of that act?

It may seem bold to question the necessity of giving notice after twenty or thirty years acquiescence in the practice; but yielding to the legislature the perfect right to mold at will commercial as well as common law, it is not easy to perceive how the right of an indorser to notice has arisen. Under the act of 1810, the courts may have thought that notice formed a part of the diligence which that statute left undefined; but under the statute of 1820, which exercises the undoubted prerogative of defining its own terms, room is not left for such construction.

58] *2. Our second position, that due diligence is a question of fact, not of law, is almost a corollary from the first.

Demand of payment may be made within a *reasonable time* after the note becomes due. What is a reasonable time? This depends upon the circumstances of each case. It is matter of proof. The statute says it shall be proved.

"What constitutes reasonable notice to an indorser is matter of fact for the jury to determine." Robertson *v.* Vogle, 1 Dall. 255, 256; Mallery *v.* Kirwan, 2 Dall. 192; Warden *v.* Carlow's Ex'r, 2 Dall. 233; 1 Yeates, 531; Ball *v.* Dennison, 4 Dall. 165; Bank of North America *v.* Petit, 4 Dall. 129.

In Alabama, it is a question for the jury. 1 Minor, 85.

In New Jersey, it is doubted whether the question of diligence be for the court or jury. Ferris *v.* Saxton, 1 South. 1.

In New York, it is a question for the court.

We contend that the legislature of Ohio, having in view these contrary decisions, and the many difficulties attending this vexed question, have, by relaxing the commercial rule and authorizing a recovery when demand has been made within a *reasonable* time, left each case to be determined upon its own facts.

In this the legislature have said nothing more with respect to all notes and bills than the commercial law itself has said with respect to bills of a particular character—we mean those payable a certain number of days after sight. The drawer of such a bill is discharged unless the bill be presented for acceptance within a reasonable time, and that reasonable time is a question for the jury. We cite the language of Judge Story, one of the ablest ex-

pounders of commercial law, in Wallace *v.* Angry et al., 4 Mason, 345: "But the principal objection is, that there has been gross negligence in the remittance of the bill, and that this would at all events discharge the drawer. There is a difference between the case of a bill of exchange, drawn payable at so many days after date, and one drawn payable so many days after sight. In the former case the bill must be presented by the period of its maturity; in the latter, it is sufficient if it be presented in a reasonable time. What that reasonable time is, depends upon the circumstances of each particular case, and no definite rule has as yet been laid down, or indeed can be laid down, to govern all cases. The question is a question of fact for the jury, and not of law for the abstract decision of the court." A slight paraphrase of this language will illustrate the position for which we are now contending: "There *is a difference as to the duties of a holder [59 of a promissory note between the commercial law and the statute of Ohio. Under the former code, the note must be presented by the period of its maturity; under the latter, it is sufficient if it be presented in a reasonable time. What that reasonable time is, depends upon the circumstances of each particular case, and no definite rule has as yet been laid down, or indeed can be laid down, to govern all cases. The question is a question of fact for the jury, and not of law for the abstract decision of the court."

In the case of Gist *v.* Lybrand, 3 Ohio, 307, an attempt was made to withdraw this question from the jury by objections to testimony. The court admitted the testimony, and refused a new trial. The last ten lines of the opinion of the court (page 320) is entirely inconsistent with the claim now set up, that diligence or no diligence is a question for the court.

3. Due diligence has been used.

The statute of Ohio does not leave us to grope in the dark as to what shall be due diligence. It defines it. If to the demand, within a reasonable time, as there expressed, we must add an implied obligation upon the holder to give notice to the indorser, we may surely claim the indulgence (in analogy to the expression used by the legislature) of giving that notice in a reasonable time. If the legislature have so far relaxed the law-merchant as to substitute a reasonable time for demand, in lieu of the very day, may we not claim that they have substituted a reasonable time for giving notice, in lieu of the very day, or the day following?

If the statute had specified notice as a duty of the holder, we may suppose section 5 would read as follows: "If any indorsee, etc., shall prove a demand made of the maker at the time the note became due, or within a reasonable time thereafter, and shall also prove that within a reasonable time after such demand he gave notice thereof to the indorser, it shall be adjudged due diligence," etc. We suppose that the counsel for the defendant read the statute in that way, and we proceed to argue this question of diligence as though that were its express language.

No one, we presume, will contend but that a want of demand and notice may, under some circumstances, be excused. If a notice be put in the post-office, directed to the indorser, at his 60] usual place of residence, though the mail be robbed, and *he never receive notice in fact, he will still be chargeable. If the note be drawn for the accommodation of the maker, and the indorser be fully indemnified, he will be chargeable, though no demand and notice. If, the day before the note falls due, the indorser tells the holder that he need make no demand or give notice, he is liable without demand and notice. We cite these instances to show that a literal compliance with the statute is not required. To comply with it substantially, to fulfill its object and spirit, is all that is required. This position might be illustrated by reference to other statutes and the construction given them by the courts. But to proceed. This note, allowing days of grace, fell due on the 13th of April. On the 19th a regular demand was made of the maker's wife, and regular notice given. Can the court say that six days is an unreasonable time? But under what circumstances did the note fall due? We prove that just before the note became due the maker had absconded to defraud his creditors, and that the defendant knew it. Why, then, make a demand at all? No demand could be made of the defendant personally. Should we demand it of his wife at his last place of residence? Why? Is it usual for a man who absconds for the purpose of avoiding the payment of his debts to leave money with his wife and family to pay those debts?

It is evident that the demand would have been an idle, useless ceremony, which the law never requires to be done. Our position is this: that demand on Wall was unnecessary, and that if, without going near his house, the plaintiff had, upon the 14th day of April, notified the defendant that Wall had absconded, and that the

note remained unpaid, we should have been entitled to recover upon the strict mercantile law. Putnam *v.* Sullivan, 4 Mass. 45.

Suit by indorsee against indorser of a promissory note, dated December 1, 1804, payable in ninety days with grace. By the law of Massachusetts that note fell due on the 3d day of March. The note being left in the Boston Bank for collection, notice was left at the lodgings of the promisor, by the messenger of the bank, on February 28, 1805, and on the 3d of March following the defendant was notified that the note was unpaid. It was also in evidence that the promisor had absconded before the note fell due, and that this fact was known to all the parties at the time. In this case the only demand was made before the note became due, and was a mere nullity, *and is so treated by the court. Upon these [61 facts the court says (and it is the great Parsons who speaks): "It appears that before the note became due the promisor had absconded; this was known to the parties, and when the note was payable he was not to be found. The condition on which the indorser of a note is holden is, that the indorsee shall present the note to the promisor when due, and demand payment of it, if it can be done by using due diligence. Now, it appears that when the note in this case was due it could not be presented to the promisor for payment, and that there was no neglect in the indorsees. We are all, therefore, satisfied that the indorsers are holden on their indorsement in this case, *notwithstanding there was no demand on the promisor.*" See also Duncan *v.* McCullough, 4 Serg. & Rawle, 480; Gist *v.* Lybrand, 3 Ohio, 307.

Having, we think, disposed of this part of the diligence incumbent on the plaintiff, namely, the demand, it only remains to inquire: Had the defendant sufficient notice?

An indorser is entitled to notice, say the books. Notice of what? That the note has not been paid. But the defendant knew everything which he could communicate to him by notice, and we say, therefore, that notice was unnecessary. Upon this point, we ask to be excused for again pressing upon the court, that notice is not required by express legislative enactment, though the legislature have acted upon the very subject. May we not ask the tribunal which imposes upon us the necessity of notice, to give to their rule that reasonable interpretation which would dispense with the notice, when it evidently would have communicated nothing new to the defendant.

R. STILLWELL, contra, argued as follows:

It is not readily discovered, from the plaintiff's argument, whether he relies on the demand at the house of Wall, and notice given to the defendant on the 19th of April, or on the absconding of Wall; it will, therefore, be necessary for the defendant to examine both points.

And he contends, that in this case, the statute has not altered the commercial rule, as to the steps necessary to charge an indorser on a promissory note. It is certaintly a bold step, as the counsel for the plaintiff remarks, to question the necessity of notice. So long 62] a practice under the law, the universal consent *of the profession and men of business generally, and the practice of the courts under this law, would seem to have settled the point. It is not, however, necessary to discuss, in this case, the question made by plaintiff, whether notice of demand or non-payment is necessary to charge an indorser. The question then is, where all the parties reside in the same town, and are all traders, is a demand, on the sixth day after the last day of grace, sufficient to charge an indorser? By the commercial rule, it clearly is not; and the defendant contends, that the words "reasonable time thereafter," mentioned in the statute, applies only to cases where there are peculiar circumstances in the case, which dispenses with the strict rule; and that it was not intended to apply to cases where the holder might as readily have made the demand on the day the note became due as on any subsequent day; and that a correct paraphrase of the statute would be: "In cases where the holder, by the use of reasonable care and diligence, could not make the demand on the day the note became due, he should be entitled to recover, if he use reasonable care and diligence to make a demand within a reasonable time thereafter." This is certainly giving as favorable a construction to the statute as the plaintiff can require. Was there anything to prevent the plaintiff, in this case, from making the demand on the day the note became due? Was there anything to prevent him from making the demand on the next day? By the use of the words "on the day the note falls due," the statute certainly contemplates that the demand should be made on that day, unless there are circumstances to excuse it. So far from there being anything to prevent the demand, on the 10th or 11th of April, and again on the 16th, the plaintiff sent to the house of Wall to inquire about the note, and received such information as

seems to have satisfisd him that Wall would pay the note, and he was willing to rely on Wall alone. Having taken this course, he can not, on the failure of these expectations, turn round, after so great a lapse of time, and throw the loss on the defendant.

The defendant contends, that the plaintiff can not recover on the ground of the absconding of Wall; because notice, if given at all, was not given within the time required. It would appear from the testimony, that on the 19th of April, the defendant gave notice of the demand and not of the absconding, and did not then claim to hold the defendant on the ground of Wall's obscond-ing. Admitting that if given in time, the *notice on the 19th [63 was sufficient to charge the defendant, on the ground of abscond-ing, yet it was not given within the time required. I presume it will not be contended, that the holder of a note is not bound to give notice to the indorser, when he seeks to charge him, on the ground of the maker absconding. By the very strict construction of the statute, urged by plaintiff, it might be argued that the plaintiff could not recover in any case, without a demand of the maker. But we do not so contend, but admit that the absconding of the maker dispenses with a demand. But where the holder asks to recover, on the commercial rule, independent of the stat-ute, he must bring himself within the rule, and that notice of the absconding of the maker and of the non-payment must be given to the indorser within a reasonable time. That is, where no peculiar circumstances intervene on the day the note becomes due, or the next day. There was nothing to prevent giving this notice immediately; the defendant lived in the same town. Should it be suggested that the plaintiff was not aware of the absconding of Wall, I reply that then he is not excused from making the de-mand at the house of Wall.

It has not been held, in any case, that the absconding of the maker dispenses with notice to the indorser. In the case cited by plaintiff, 4 Mass. 45, notice was given to the indorser that the note was unpaid.

Known insolvency of the maker would furnish as strong ground to dispense with notice as absconding, yet known insolvency does not dispense with notice. The death, bankruptcy, or known in-solvency of the drawer, or his being in prison, constitute no ex-cuse, either at law or in equity, for the neglect to give due notice of non-acceptance or non-payment. Russell v. Langstaff, Doug.

497, 515; Eisdale *v.* Sowerly, 11 East, 114; ex parte Wilson, 11 Ves. 412; Whitfield *v.* Savage, 2 Bos. & Pul. 279; Thackary *v.* Blarket, 3 Camp. 165; Haynes *v.* Borks, 3 Bos. & Pul. 601; Edwards *v.* Thayer, 2 Bay. 217; Pierce *v.* Young, 1 Nott & McCord, 438; Clair *v.* Barr, 2 Marsh. 256. There are numerous other cases which might be referred to, but these are presumed to be sufficient. It is not competent to the holder to prove that the delay in giving notice has not in fact been prejudicial. Eisdale *v.* Sowerly, and Russell *v.* Langstaff, *ut supra;* Bickerdike *v.* Bollman, 1 Term, 408; De Berdt *v.* Atkinson, 2 H. Black. 336; Warrington 64] **v.* Furbor, 8 East, 245–247; Cory *v.* Scott, 3 B. & A. 623; Nicholson *v.* Gouthit, 2 H. Black. 612.

Nor will the circumstance that the drawer had informed the drawee before the bill became due that it would not be paid, excuse notice. Nicholson *v.* Gouthit, 2 H. Black. 612; Eisdale *v.* Sowerly, 11 East, 117.

It may also be observed that there is no evidence of the fact that the defendant knew that Wall had absconded at the time the note became due, or even as late as the 19th of April. Wall had not been absent an unreasonable time. All the suspicion that existed arose from the statement of Ballentine, who did not himself think it sufficiently certain to act upon. The family of Wall stated that they expected him to return. The plaintiff, by his frequently sending to inquire, and on the 19th of April making a demand of payment, showed that he did not at that time consider Wall as having absconded, and that he relied on this demand and notice of non-payment as the circumstance on which to charge the defendant. The defendant, also, when notified of the demand and non-payment, entertained the opinion that Wall had not absconded. It would be unreasonable, then, to charge the defendant with the knowledge of the absconding on the 13th of April (admitting that this would charge him), when all the parties expected him to return as late as the 19th of April.

Under these circumstances, it was the duty of the plaintiff to make demand at the house of Wall at the time the note became due. Pierce *v.* Young, 1 McCord, 339. Admitting that defendant had notice of the absconding of Wall, and non-payment of the note, it was not given by plaintiff or any person interested in the note. The earliest cases held that a notice of the dishonor of a note would not charge the indorser, unless given by the holder or

his agent. Tindal *v.* Brown, 1 Term, 170. The rule, however, has been relaxed, and it is now sufficient if given by any party to the bill or note. But it has never been suggested that notice from a stranger is of any avail. Due diligence is matter of law for the court. It is unnecessary to go into the reason of this rule; it is so perfectly obvious that if left to the jury in each case, there would be no rule, and the decision would be variant in every case. It is matter of little moment to the community in what manner the rule is settled, but of great moment that it should be settled. By considering it as matter of law, the rule is fixed and determinate in each *case. By submitting to a jury, each case must [65 depend on the ignorance or caprice of the jurors. After much discussion and examination, the rule was finally established in England that it is matter of law. Tindal *v.* Brown, 1 Term, 168; Derbyshire *v.* Parker, 6 East, 3, 9, 10, 12; Haynes *v.* Brooks, *ut supra*. Although the cases cited for the plaintiff from Pennsylvania differ from this rule, yet in that state the law is now otherwise settled. McKean, Chief Judge, in delivering his opinion in the case of Bank of North America *v.* McKnight, 1 Yeates, 145, states the law as it is now settled to be, that due diligence is matter of law. So in New York, as stated in plaintiff's argument. So in Massachusetts, Hussey *v.* Freeman, 10 Mass. 84. So in Kentucky, Doge *v.* Bank of Kentucky, 2 Marsh. 616. So in Maryland, Philips *v.* McCurdy, 1 Har. & J. 187. So in New Hampshire, Haddock *v.* Murray, Adams, 140. So in Vermont, Nash *v.* Harrington, 2 Aik. 9. And this is nothing more than the power the court possesses in all civil cases.

The jury find the facts, and the court determine the law from those facts. In this case, there was no dispute as to the facts, at the time of the trial; the defendant examined no witnesses, and admitted all the testimony to be true. It is argued by the plaintiff, that the words "reasonable time thereafter," in the statute, were intended to withdraw the question of due diligence from the court. This is not correct. Where the last indorser receives notice from the holder that a bill or note is dishonored, in order to charge a prior indorser, he is bound to give notice as soon as he reasonably can. Now, if this argument of the plaintiff were correct, this reasonable time would be a question for the jury. But according to the cases collected in the case of Derbyshire *v.* Parker,

6 East, 6, 9, 12, it is a question of law depending nevertheless on the circumstances of each case.

We contend that the words "reasonable time" shall receive the same construction in both cases.

GODDARD, in reply:

The evidence is, that the defendant, before the note became due, knew that Wall had absconded in fraud of his creditors; and knowing this, he knew a demand of payment would be unavailing, and he knew all that notice from the holder of the note could communicate to him.

The demand has then been made, in the language of the statute, "within a reasonable time;" that is, the demand and notice were 66] just as beneficial to the defendant as they would have *been if demand had been made and notice given at an earlier period.

Judge WRIGHT delivered the opinion of the court:

We are unanimously of opinion that there was no error in the charge of the court. The question of diligence is one of law, and for the court in all cases where the facts are ascertained. When the facts are contested, the legal question is mixed with the facts, and goes to the jury under instructions from the court, upon the law arising upon the various hypothetical state of facts claimed to be made out in evidence. On the trial of this case there was no dispute about the facts; they were conceded, and we all think, with the judge who gave the cause to the jury, that the circumstances in proof did not establish the use of that diligence required by law of an indorsee of a note to enable him to recover of an indorser, nor excuse the omission.

Section 5 of the act of 1820, making certain instruments of writing negotiable, 29 Ohio L. 217, provides that if in suits by an indorsee against an indorser the plaintiff shall prove a demand of the maker, when the note became due, "*or within a reasonable time thereafter, it shall be adjudged due diligence.*" Counsel have examined at length what is the *reasonable time* mentioned in this provision, in the hope of eliciting from us a construction of the law as a rule of practice. We admit the importance to community of a construction of this act. As it respects paper strictly commercial, such as is on its face made negotiable at banks, we think our law has made no innovation upon the rule of the law merchant.

As to other descriptions of negotiable paper, we have not been able to unite our minds, or those of even a majority of us, upon a construction of the statute that would carry into execution the meaning or intention of the legislature.

New trial refused, and judgment on the verdict for the defendant.

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*Richmond Cheadle *v.* Perez B. Buell. [67

A charge that A. B. received a letter to convey, containing money, giving himself a false name at the time, and promised to deliver the letter, instead of which he broke open the letter and used the money, is a charge of larceny and actionable.

A full statement of this case is given in the opinion of the court by Judge Wood.

Gage, for plaintiff.

Goddard and Converse, for defendant.

Judge Wood delivered the opinion of the court:

This case was tried on the last circuit, in the county of Morgan, and a verdict found for the plaintiff. The defendant's counsel filed a motion for a new trial, and assigned for cause, that the verdict of the jury was against the evidence and the law of the case; also, a motion *nisi*, in arrest of judgment. Both motions were reserved for decision in this court. The cause was tried on the first count of the declaration, the pleas of the general issue, and a justification.

The words laid to have been spoken were: "1. He (the plaintiff meaning) represented himself to Colonel Stone, of Point Harmar, to be a man by the name of Seely, whereby he obtained of said Stone a letter containing money, which he was to deliver to the owner; but instead of doing so, he (the said plaintiff) *broke open* the letter and *used* the money himself.

"2. He (the plaintiff meaning) took money in a letter from Col. Stone to a man by the name of Elliott, which money belonged to Elliott, and he (the plaintiff) broke open the letter, and put the money to his *own* use.

"3. He (the plaintiff meaning) represented himself to Col. Stone to be a man by the name of Seely, by which means he obtained a letter, directed to one Elliott, containing money belonging to said Elliott, which said money and letter he agreed to deliver to said Elliott, but instead of doing so, he broke open the letter and used the money.

"4. He (the plaintiff meaning) has been guilty of obtaining money by false pretenses.

"5. He (the plaintiff meaning) falsely represented himself to be one Seely to Col. Stone, whereby he obtained of said Stone money belonging to one Elliott, which he converted to his own use."

68] *The first, in order, to be considered, is the motion for a *new trial.* Is the verdict against the evidence which was given? Two issues are presented in the record: 1. The defendant denies the speaking of the words. 2. He admits the words were spoken, and avers that they were *true.* When two issues are presented in this action, as in this case, not guilty and a justification, each is to be disposed of in the same manner as if it stood alone on the records. Dewit *v* Greenfield, 5 Ohio, 225.

If the jury find either issue against the evidence, or clearly and manifestly against the weight of the evidence, a new trial will follow. Bac. Abr., New Trial.

To prove the first issue, the plaintiff called one Keyes, who testified that the defendant said to him that the plaintiff went to Col. Stone's, assumed the name of Seely, and by that means got a letter to Elliott, with fifty dollars in it; broke open the letter, used the money, and afterward replaced it.

A second witness of the same name, and a third by the name of Davis, proved the same words, nearly, spoken by the defendant. The rule is laid down in 2 Stark. Ev. 844, in reference to libels, thus: "The same strictness (perhaps on the ground of convenience) does not apply in actions for words; for if some of those, being actionable, be proved, an omission to prove the remainder of the words laid in the context with them, or a variance from the latter, will not be material, provided the words proved do not differ in sense from those alleged, considering the whole context." In other language, if part of the actionable words be proved, *substantially,* as laid, the plaintiff shall recover for *them.* The evi-

dence of each witness appears to us to have proved the speaking of *all the words*, at least, *substantially*, as laid in the declaration.

The defendant then read the deposition of Col. Stone, and called two witnesses to prove the second issue.

1. The deposition of Col. Stone, who testified a letter was placed in his hands, said to contain twenty-five dollars, from Ambrose Elliott, addressed to him, Elliott, with a request that the witness would transmit it to Mrs. Elliott, at Olive Green, some twenty miles distant; that he gave the letter, sealed, to the plaintiff, who lived a few miles from Olive Green, and desired him to leave it at McIntosh's store, but two or three miles from Mrs. Elliott's, at his, Elliott's, residence.

*2. Ambrose Elliott testified that he inclosed twenty-six dol- [69
lars in a letter, which he *sealed* with care and sent to Colonel Stone, to be forwarded to his wife; that he learned, two or three weeks afterward, the letter had not been received; that he went to Marietta and inquired of Colonel Stone concerning the letter; that Colonel Stone did not then recollect by whom he had sent it; but wrote him, six or eight weeks afterward, that it was by the plaintiff; that the witness then went to the plaintiff and inquired of him if he had brought a letter from Colonel Stone, to be left at McIntosh's for Ambrose Elliott, to be sent to his wife, Mrs. Elliott. This was at the plaintiff's store; that the plaintiff *denied any knowledge of such letter;* witness then handed him Colonel Stone's letter; plaintiff, after reading it, admitted some indistinct recollection of it, and sent witness to the house to inquire of his wife for it; that he went to the house; Mrs. Cheadle searched for the letter, but could not find it; that he returned to the store, and the plaintiff then went with him to the house, looked in the *chest*, which had been *previously* examined by Mrs. Cheadle, and handed witness the letter; witness could not tell whether the plaintiff took the letter from the chest or not; plaintiff asked witness if he did not wish a knife to *open* the letter; that he, witness, said not; that the letter opened without an *effort*, and he thought the *seal had been broken;* that the letter contained the same amount of money he inclosed; but he could not say whether it was the *same* or not.

Enoch S. McIntosh testified, that the plaintiff was twice at his store, during the time the letter must have been in his possession; that his store was the place at which the letter was to be left. This evidence, on the part of the defendant, was not attempted to be

denied nor impeached; and the peculiarly frank, apparently candid, and intelligent manner in which Elliott testified, is still fresh in the recollection of two members of this court.

The court entertain the opinion, that the first set of words, laid in the declaration, amount to a charge of larceny. There is no mystery in the definition of this offense. It is the felonious taking and carrying away the personal goods of another. In other language, it is a taking and conversion of another's property, in a secret and clandestine manner, and with the intention, by secrecy and fraud, to deprive the owner of his remedy to recover his goods. Did the defendant's evidence prove this offense to have been com-
70] mitted? If so, this issue should have *been found for the defendant. Let us look a moment at the proof.

1. The plaintiff received the letter sealed, with the knowledge that it contained twenty-five dollars.

2. He was to leave it at the store of McIntosh.

3. He was twice at the store, while the letter was in his possession, but he did not deliver it.

4. He kept it more than ten weeks.

5. When Elliott inquired of him about the letter, he denied all knowledge of it, until Elliott delivered him the letter of Colonel Stone.

6. He pretended to find the letter in the chest, which had been examined by his wife *previously*, without his knowledge.

7. He offered Elliott a *knife to open the seal*, when it was already broken, as the witness believed.

Can there be any reasonable doubt entertained, but what this evidence proves the *secret* and *clandestine* taking and conversion of the money to his own use, with the *intention* to deny to Elliott all remedy to recover it? We think not. Our opinion is, therefore, that the jury found this issue for the plaintiff, against the evidence given on the trial.

We can arrive at no other conclusion than this: that Cheadle opened the letter and took out the money, with the *intention* to convert it to his own use; that he supposed, as Elliott was in Pennsylvania, and he himself a stranger to Colonel Stone, the letter would probably never be traced to his hands. To guard against accidents, however, he kept the letter in his possession; and while Elliott was sent to *his house*, to inquire of his wife, he, the plaintiff, was replacing either the same, or other money in it, *at the store*.

That the seal was broken, is proved by Elliott, and the very *unusual inquiry* put by Cheadle, in relation to the *knife*. Having taken the money from the letter, with the intent to steal it, the offense was complete, although the *same money* might have been afterward replaced.

Suppose, however, the crime of larceny was not fully proved, the circumstances were such, in *mitigation*, that the law would give but *nominal damages*. A man who comes into court, with hands unclean, his reputation stained and polluted by his own depravity, is entitled to nothing more than his *naked legal rights;* he is not to be encouraged with anything beyond these. It is the man who comes, like the complainant, in chancery, having done and prepared to do equity, who brings a character unpolluted *and [71 worthy of protection, that receives the indulgent and willing attention of the court.

In giving a verdict for *more* than *nominal damages*, the verdict is against the law of the case on the first issue, and a new trial must be granted. Defendant to pay the costs of the term.

This decision makes it unnecessary to say anything on the motion in arrest of judgment.

Charles W. Gazzam *v.* Cincinnati Insurance Company.

In a policy of insurance upon the body of a steamboat upon time, the insurer is not chargeable with the wages of the crew while the boat is stranded within the time insured.

The insurers are liable for the entire expense of repairing the injury, though only part of the repairs were effected at the first port made after it occurred, and the remainder at another port.

The running of the boat while unseaworthy, after the injury complained of, does not avoid the policy,

The assured have no right, in such case, to have the items of loss analyzed, to ascertain, if upon each separately, the amount is equal to that for which the assurers have become liable.

The court in bank, as a general practice, will only consider those questions which are submitted in the county, and there reserved for decision.

Reserved from Hamilton. *Assumpsit* upon a policy of insurance on the steamboat Trenton, which, by distress of weather, ran on the

rocks at the falls of the Ohio. On trial, the jury found the following special verdict, viz: "The jury, upon their oath, do find that the defendant did undertake and promise, as the plaintiff in his declaration has alleged, and that the following items of loss are made out by the evidence, that is to say:

"1. For the expense of repairing the steamboat Trenton at Louisville, one hundred dollars; for expense of repairs of same at Pittsburg, five hundred dollars, which reduced one-third, for new work, leaves chargeable upon the insurance four hundred dollars.

"2. The boat's average for extra expense of labor, etc., in getting her off the rocks, seven hundred and sixty-nine dollars seventy-two cents.

"3. The boat's average on jettison of cargo, seven hundred and twenty-four dollars thirty-four cents.

"4. The boat's contribution for wages of the crew while on the rocks, three hundred and ninety-eight dollars.

"Making, in all, the sum of two thousand two hundred and ninety-two dollars six cents; one-half of which sum is chargeable 72] upon the policy offered in evidence in this case. *But the jury, being unadvised which of said items are in law chargeable under the policy, refer that matter to the court; and if the court shall be of opinion that the whole of said items are a proper charge upon the insurers, then the jury assess the plaintiff's damages to one thousand two hundred and eighty-three dollars fifty-five cents, that being one-half of said sum, with interest from May 1, 1831; but if the court shall be of opinion that any one or more of said items is not a loss chargeable on said policy, the amount so rejected, with interest, shall be deducted from said damages, and the jury assess the damages of the plaintiff to the remainder of said sum."

The plaintiff moves for judgment on this verdict.

CASWELL and STARR, for the plaintiff, cited 7 Pick. 259; Phil. on Ins. 331; 3 Kent's Com. 185, 189; Ab. on Ship. (Story's) 342, 350, n. 1; 9 Johns. 9; 5 Ohio, 305, 315, 317; Hughes' Ins. 217, etc.; 3 Mau. & Sel. 182; 3 Barn. & Cress. 805; 4 Mau. & Sel. 141; 1 Term, 127, 132; 3 Term, 107; 4 East, 34; 7 East, 24; 3 Bos. & Pul. 479; 7 Mass. 363; 14 Mass. 74; 8 Johns. 307; 11 Johns. 315; 4 Dall. 246; 2 Bin. 547; 2 Wash. C. C. 226; July No. Amer. Jurist, 115; 2 Caine, 263.

STORER and FOX, for the defendants, cited Phil. on Ins. 485; Stew. on Av., pt. 4, p. 211; Hughes on Ins. 284; 2 Term, 407; Park on Ins. 89, 207; Marsh. on Ins. 539; 4 Mau. & Sel. 141; 4 Mass. 548; 7 Mass. 365; 2 Caine, 262, 274; 10 Johns. 487; 2 Day, 243; 5 Ohio, 306.

They also argued a motion for a new trial, and cited many authorities, which are omitted, because the court refused to consider that motion.

WRIGHT, J., delivered the opinion of the court:

The policy insures six thousand dollars, agreed value, upon one-half the steamboat Trenton, from twelve o'clock at noon, on October 11, 1830, until noon on May 11, 1831, to navigate the usual western waters, exclusive of the lead trade, with privilege, during the time, to proceed, touch, and stay at any ports or places, if thereunto obliged, by stress of weather or other unavoidable accidents, or for the purpose of receiving or discharging freight or passengers, or to take in wood, without prejudice to the assurance. It was also agreed, in the policy, that the insurer should not be liable for any partial loss, nor for any *general or particular [73 average, unless the loss or average shall amount to ten per cent. on the value.

It is objected to the item for the wages of the crew, while on the rocks, that it is not chargeable under this policy. The assurance here is on the body of the boat, for a specified time, and is like that in Perry v. Ohio Insurance Co., 5 Ohio, 306. In that case, this court held that "the ordinary wages of the crew and their subsistence are only the common expenses of the boat, and are neither increased nor diminished by the accident insured against." It is "charge resting on the assured at any rate. The claim is, not that their pay and subsistence was *extraordinary*, resulting from the accident, but that their labor was not as productive of profit to their employer as it otherwise would have been." The boat, in this policy, is privileged to navigate the western waters, etc., for seven months; but the insurers nowhere stipulate that she shall be so *employed*, or that they will make good any loss of wages while she remains idle. If, in case of accident, the crew be retained under their original engagement, their wages are not an extraordinary expense, and as the crew were not employed, in consequence of the accident, their wages

and subsistence did not result from it, and can not, in our opinion, be chargeable upon the insurer. This item, therefore, will be deducted from the verdict.

The defendants claim that the item for repairs at Pittsburg must be rejected, upon the ground that the boat was bound to New Orleans, at the time of the accident, and the repairs were not made until after she changed her destination, and had made several trips from Louisville to Pittsburg. That the removal of her from Louisville, when partially repaired, was allowable, only because it was necessary to remove her for the purpose of completing the repairs; and if it was necessary to remove the boat from Louisville, that the assured were bound to complete the repair at the *first* convenient port. If, it is contended, the condition of the boat was such as to render her seaworthy when she left Louisville, after the partial repair, she was bound to resume her voyage to New Orleans, and the breaking up the voyage, without abandoning to the underwriters, exonerates them; and if, on the contrary, the boat was unseaworthy, from the time of her rescue from imminent peril until she was completely repaired at Pittsburg, and that was the proper port for repair, the policy terminated, and the liability of the underwriter was at an end, 74] the moment she left the latter place *without repair, as the law holds the assured to a continued warranty of the seaworthiness of the boat. However forcible this reasoning might be, if the assured were attempting to recover for an injury to the boat after she ceased to be seaworthy, we do not recognize its force or application in the case actually before us. And as to the allegation of the boat's making several trips between the time she left Louisville and her complete repair, the answer is: 1. The fact forms no part of the case before us; 2. If it did, the insurance is upon time, and not upon any particular voyage.

It is further objected to the item for repairs at Pittsburg, that it does not amount to ten per cent. upon the sum insured, and can not be added to the repair at Louisville, in order to make that amount. In Brooks *v.* Oriental Insurance Company, in the Supreme Court of Massachusetts, 7 Pick. 268, it was held that "the master had a right to exercise a sound discretion upon that matter, and that the defendants are liable for the expenses of the temporary repair, etc., which are to be added to the complete repairs, etc., which sums, together, are to be considered the

expenses of repairing the damages." This rule is obviously just. The real question is, what was the expense of repairing the injury? A boat is so crippled at Louisville, that she can not move at all without some slight repair, but the expense of repairing there is much greater than at Cincinnati—is the master bound, or would he act in good faith to the underwriters, if he made the whole repair at the most expensive place, instead of only doing there what was *necessary* to enable him to run the boat to one less expensive for a thorough repair? It is true all these things require the exercise of good faith; and we think it equally true that the want of it can only be urged to the jury, which is the proper tribunal to determine that question.

It is further contended for the defendant, that as *jettison* and *general average* are both specially insured against, when amounting to ten per cent. after the valuation, or six hundred dollars, the claims arising under these heads must be analyzed to find if the damage from each amounts to ten per cent.; and, therefore, that inasmuch as neither one-half of the average found for salvage, nor one-half of that found for jettison, amounts to ten per cent., both those items are to be excluded from the verdict. To establish the justice of the point contended for, counsel supposed the case of "*a vessel injured in her hull, the subject primarily insured, to a very small amount; but a jettison has occurred, which compels a contribution;*" and insist that "if the trifling injury to the ship can be tacked to the [75 jettison, the most flagrant injustice would follow." The flagrant injustice of the hypothetical case arises from the circumstance that the argument loses sight of the *object* of the jettison, which is *the safety of the ship*, and the liability of the assurer to contribute to the jettison in proportion to his interest, is alone *what exonerates him from responsibility for a total loss.* The insurer can not be permitted to complain of an injustice which relieves him from paying a greater sum, by holding him liable to a less. But counsel is mistaken in the assumption that jettison or general average are *especially* insured against in this policy. In terms, it assures the boat for seven months to navigate the usual western waters. Jettison is nowhere named in the policy; and general average is only alluded to in the clause which authorizes the assured, their factors, servants, and assigns, to labor, in case of loss or misfortune, for the safety, defense, and recovery of the boat, without

prejudice to the assurance; and stipulates to contribute to the charges thereof in proportion as the sum insured is to the whole sum at risk. Whatever of force there may be in that objection, in a proper case, therefore, it has no application to this case. Nor are we able to discern either the justice or the legal obligation of the claim to separate into moieties the items objected to, before we determine the liability of the defendants. They stipulate that if the whole loss is ten per cent. or six hundred dollars, they will pay one-half of it. They do not contract, that if one-half the loss shall amount to ten per cent. they will pay the whole of it; if they did, there would be some force in the argument. The case at bar is not within the rule laid down in Stephens on Average, pt. 4, art. 3, p. 211, "that if several articles be insured together, free of average, under five per cent., and average be claimed upon the whole, the claim should be analyzed to find if each be damaged five per cent.; and unless the average on each of them, separately, amount to five per cent., the claim must be substantiated as only one of them." Here is no insurance of several articles together; the policy is confined to one, the boat.

The counsel for the defendants have argued at length a motion for a new trial in this case, predicated upon a supposed error of the court in its direction to the jury; and a motion for a new trial is certified by them as found among their papers, which was prepared by them before the special verdict was reduced to form. The record shows that the only question reserved for decision here, was the "motion for judgment on the special verdict."

76] *In this state of things, the counsel for the plaintiff object to the consideration of the motion for a new trial, because it is not properly before the court. The first section of the act to establish a court in bank, 29 Ohio L. 93, makes it our duty "to hold a court in bank, for the final adjudication of all such questions of law *as may have been reserved in any county for decision.*" It is questionable whether, as a court in bank, we have authority to entertain original motions of this kind; but however that may be, it has not been our practice to consider motions not submitted in the county and reserved for decision; and we see nothing in this case to require a change of practice. The arguments for a new trial, therefore, have not been examined.

Deducting from the verdict one-half of the item of three hundred and ninety-eight dollars, with the interest thereon, the boat's

contribution for the wages of the crew while on the rocks, which we think not chargeable on the assurer, the plaintiff is entitled to judgment for the remainder of the damages assessed by the jury, viz: one thousand and sixty-two dollars and sixty-seven cents, with costs.

MARY DUNSETH *v.* THE BANK OF THE UNITED STATES.

Widow to be endowed according to the value of the ground at the time of assignment, excluding increase of value from improvement, but including increased value from other extrinsic and general causes.

IN chancery; adjourned from Hamilton. The whole case is stated in the opinion of Judge WOOD.

Judge WOOD delivered the opinion of the court:

The complainant, widow of Andrew Dunseth, filed her petition in the court of common pleas of Hamilton county, claiming dower in certain lands in the city of Cincinnati.

The lands were alienated by the husband, and finally passed to the Bank of the United States.

The complainant obtained a decree in the court of common pleas, and the defendant appealed.

All the facts necessary to establish the complainant's right to dower in the lands in question, viz: that they can not be divided without injury; that the complainant can not, therefore, be endowed **in kind;* and her consequent right to be endowed of [77 one-third part of the *rents, issues, and profits* of the land, *according to their value*, are admitted by the parties; and the only question submitted for our determination is, *at what time shall the value of these lands be ascertained?*

This, it is conceded, is an important inquiry, and it is believed there is at this time a diversity of opinion upon it among the members of the bar. This is the *first* time it has been presented to *this* court for decision, and we extremely regret the counsel for the defendant have not furnished us that *aid*, in pursuing our inquiries, their research and reflection are so fully competent to afford. We are not only denied the assistance of *their* argument,

but also a reference to a single authority on which they rely! Principles esteemed so important as to require the deliberation of the whole court, ought always to receive the most free and liberal discussion.

We have endeavored, however, to give this case the most mature and deliberate consideration, and are unanimously agreed in the conclusions to which our minds have been led.

Dower is a claim flowing from *marriage*, and *marriage* is so highly regarded as to be a valuable consideration for the settlement of property on the wife. It is a right founded on law, and favored by courts both of law and equity. 5 Serg. & Rawle, 290. By marriage, the husband becomes entitled to the services of his wife. He has the control and custody of her person. If she is seized of an estate of inheritance in land, the husband becomes seized of the freehold, *jure uxoris*, and he takes the rents and profits during their joint lives. Coke's Littleton, 355. The husband may reduce to possession the choses in action of the wife, and by operation of the law, they are his own. He, by the marriage, succeeds to the personal property of the wife. It vests immediately and absolutely in the husband; he can dispose of it at pleasure; and, n case of his death, it goes to *his* representatives. These are some of the disabilities which, by the marriage, the law casts upon the wife.

In return for these, to provide for her support, and to enable her to nurture, sustain, and educate her children, in case she survive the husband, the law gives her *one-third part* of all the lands of which her husband was seized as an estate of inheritance during the coverture, during her life. It is a claim sanctioned by long-established usage, so ancient that its origin is now lost in doubt
78] and uncertainty. In 2 Bl. Com., tuck. ed. *130, it is said that dower is possibly the relic of a custom of the Danes; but, however this may be, Lord Coke informs us, it is one of the three favorites of the common law. Kent, in the fourth volume of his Commentaries, 36, calls it a "humane provision," which has continued unchanged in the English law to the present times, and, with some modifications, has been everywhere adopted as part of the municipal jurisprudence of the United States.

The statutes of the several states, in relation to dower, it is believed, have constantly received a most liberal and beneficial con-

struction, and have been considered as entitled to the favorable consideration of all courts of justice.

The law favors the assignment of dower by *metes and bounds*, but where that assignment can not be made, dower is to be assigned of one-third part of the rents, issues, and profits of the lands, according to their value. Here, then, we are brought back to the inquiry, "at what time shall the value of the lands be ascertained?"

The statute of 1823, vol. xx, 249, under which this claim is made, so far as it is necessary to be considered, is but a recognition of the common law principles, and is similar to the statutes of Massachusetts and Pennsylvania. The *identical question* now before us is discussed by Chancellor Kent. 4 Kent's Com. 67. He says the better and more general doctrine is, in this country, that the improved value of the land from which the widow is to be excluded, in the assignment of her dower, *even against a purchaser*, is that which has arisen from the actual labor and money of the owner, and not from that which has arisen from extrinsic or general causes. The same principles were laid down by Chief Justice Parsons, in the case of Gore *v.* Brazier, 3 Mass. 544.

We are of the opinion that these principles stand upon reason and justice for their support. If the lands diminish in value, subsequent to the alienation, the widow is, it is conceded, subjected to the loss; and if they rise in value from any other cause than the acts of the alienees, such as the general prosperity of the country or neighborhood, it would seem to be the most consummate injustice not to permit the widow to partake of the general prosperity.

Chief Justice Tilghman, in 1819, in the case of Thompson *v.* Morrow, 5 Serg. & Rawle, 289, in a very learned and elaborate opinion, reviewed the English decisions, including those contained in the year books, and declares there is no principle of *the [79 common law that will exclude the widow from the increased value of the lands arising from other causes than improvements *made by the alienees*, and that the decisions in Massachusetts and New York sustain him in his opinion. He concludes his remarks in this case by saying, that he has consulted all the authorities which bear upon the question, and he finds himself at liberty to decide according to what appears to him to be the reason and justice of the case; which is, that the widow shall take no advantage

of the *improvements of any kind* made by the purchaser; but throwing those out of the estimate, she shall be endowed according to the value, at the time her dower shall be assigned to her.

This question was again discussed, in 1824, by Mr. Justice Story, in the Circuit Court of the United States, for the first circuit, in Massachusetts, and decided, under the laws of that state in relation to dower. All the cases, *English* and *American*, were again reviewed. The judge cites the above opinion of Chief Justice Tilghman; accedes to his reasoning; declares the doctrine stands on solid principles and the general analogies of the law. Powell et ux. v. Monson S. B. Manf'g Co. 3 Mason, 375.

Opposed to these authorities, is the *dictum* of a dissenting judge on a point not made in the cause: that the value of the lands was not to be ascertained, at the time of the *alienation*, had been determined in the case of Ewing *v.* Stanbery. However much we may respect the opinions of that very learned and distinguished judge, this mere dictum, in relation to a circuit decision, can not be claimed as an authority. We choose rather to adopt the opinions of Kent, Parsons, Tilghman, and Story, "that the widow should be endowed of the rents, issues, and profits of the lands, according to their value, *on the assignment of her dower*, excluding all increase of value from the money or improvements of the alienees, and including all increase from other extrinsic and general causes." Let a decree be drawn accordingly.

80] *Daniel Green *v.* John Dodge and Eli Cogswell.

Chancery will not relieve against a judgment at law, and grant a new trial, where the matter complained of arose in any way from the negligence of the complainant, or because the parties relied upon the promise of the judges to see the proper entry made.

When a security receives from the principal debtor demands, for the purpose of discharging the debt by their transfer to the creditor, or by payment of the money collected, he holds the claims, or their proceeds, as trustee of the creditor.

In chancery from Washington. The bill of the complainant makes this case: That in February, 1821, one Sydney Dodge was

indebted to him in the sum of sixteen hundred dollars, and an arrangement was entered into between the complainant, the said Sydney, and the defendants, John Dodge and Eli Cogswell, that if the complainant would forbear the payment of said debt, one-half for fifteen months and the residue for two years, that Sydney Dodge should give his notes payable at those times, and the defendants should indorse the notes and guaranty the payment, which was accordingly done. The notes were given payable to the complainant alone, and were indorsed by the defendants in blank, as guarantors of the payment. No part of said notes has been paid except five hundred and seventy-seven dollars and sixty-eight cents, received on July 15, 1823, from John Dodge, one of the defendants, which is credited on the note that last became due. A judgment was recovered against the said Sydney, and he became insolvent, leaving complainant no other reliance for his money than the guaranty of the defendants, who had full notice of the non-payment. That to indemnify the defendants from their liability, John Dodge, one of them, received from the said Sydney notes, accounts, and judgments sufficient to pay the notes. The complainant, with a view to collect the money due by Sydney Dodge, placed the notes in the hands of counsel for prosecution, who filled up the blank indorsement as follows: "We, the undersigned, bind ourselves as security for Sidney Dodge, for the payment of the within note, according to the tenor thereof, to Daniel Green, the obligee in said note;" but in affixing the date to the indorsement on the note payable in fifteen months, he by mistake wrote it February 21, 1823, instead of 1821, which was the true date. Suit was brought on the notes, and in the declaration the indorsement last aforesaid was denied, as of the erroneous date. The cause was brought to trial before the Supreme Court in bank, in 1826, upon an agreed state of facts as above, and also "that no consideration passed from Green to Dodge and Cogswell, on account of said notes;" whereupon, the court found for *the defend- [81
ants, and rendered a judgment accordingly. That said judgment was, through mistake of the court or their clerk, entered so as to become a bar to any subsequent suit, whereas, the grounds of the judgment were the want of an averment in the declaration of any consideration for the undertaking of the defendants, or of a demand of them, or of notice to them of the non-payment, or any valid excuse for omitting such demand and notice, or evidence of

a waiver of the demand and notice, or other legal liability; although, in fact, the consideration was the forbearing the debt to the said Sydney; and in fact, also, a demand was made of the defendants, and they were notified of the non-payment. That the complainant's counsel, who drew the declaration, was of opinion no averment of the consideration, or of non-payment, or demand and notice, was in law required in the declaration.

The defendants did not demur to the declaration, but plead the general issue, and for the purpose of a trial entered into the agreement as to the facts as stated. The pleadings, on that account, did not contain a true state of the facts in the case, but only the artificial case drawn by the attorney; that at the court in bank, before the decision, the plaintiff's counsel was informed by the court that the declaration would be held insufficient; and he immediately requested of the court leave to amend, which the court refused, observing that the plaintiff would be put to a new action, and the judgment would be so drawn as to be no bar to another suit. The counsel was called from court by sickness in his family, and did not return till after its adjournment, nor discover until then that, in the hurry of business, the judgment had been entered so as to be a bar. At a subsequent term of the court in bank, counsel moved the court to amend the judgment, which was refused, because of the want of power in the court to amend. He has since sued the defendant, John Dodge, on said guaranty, but he pleaded the said judgment in bar, and the plea was adjudged good. And so, while in the prosecution of a fair and honest claim, without laches of himself or his counsel, he has been deprived of his rights by accident and misfortune. Upon this case he prays for a new trial and general relief. See 2 Ohio, 439, and 3 Ohio, 486.

The defendants demur to all this bill, except the allegation of the receipt of the fund for indemnity. As to that, J. Dodge and Cogswell answered, denying all fraud and the receipt of any fund as indemnity, but admitting that in July, 1823, Sydney 82] *Dodge placed in John Dodge's hands sundry demands, to be handed over to the complainant, in payment of the notes, which he offered to the complainant, who selected two demands, amounting to five hundred and fifty-three dollars and eighty-one cents, and rejected the residue; and that the defendant, John

Dodge, has since collected two hundred and twelve dollars and two cents, and no more, which has never been demanded of him.

NYE and GODDARD, for defendants, cited 4 Ohio, 469; 2 Ohio, 7, 311; 1 Ohio, 429; 4 Ohio, 327, 239, 241; 3 Johns. Ch. 351; 6 Johns. Ch. 87, 194, 479; 2 Johns. Ch. 557; 1 Johns. Ch. 97; 14 Johns. 63; 3 Pet. 520.

H. H. HUNTER and H. STANBERY, contra, cited Mit. Pl. 206, 208, 195, 200, 102, 106; 2 Vern. 146, 190, 232, 378, 419, 437; 1 Eq. Cas. Ab. 240, 377, 378; 2 P. Wms. 424; 2 Vent. 351; 4 Ohio, 175; 6 Johns. Ch. 479; 7 Cranch, 69; 1 Serg. & R. 241.

WRIGHT, J., delivered the opinion of the court:

Two points are made on this demurrer:

1. That the matters set forth in the bill are of exclusive legal cognizance, and have been tried and determined *at law*.

2. That no fraud or accident within the jurisdiction of the court is shown in the bill; but, on the contrary, it is shown that if the complainant ever had a meritorious case against the defendants, he has lost it by his own negligence or that of his agents.

This court has determined, in Leiby *v.* Parks et al., 4 Ohio, 492, that it is not proper for a court of equity to inquire whether a court of law, in a matter within its jurisdiction, erred in opinion, nor whether a fair and impartial trial has been had at law, unless the complainant clearly shows that he had a good defense, and was prevented by fraud or pure accident, without any fault or negligence of himself or his agents, from availing himself of it. The present chief judge, in giving the opinion of the court in that case (page 493) uses the following language: "Should this court enjoin this judgment, and order a new trial at law, because a fair trial had not been had, it must order a new trial in every case, where the defendant may, in general terms, allege fraud in the plaintiff in obtaining the verdict against him, and that there existed evidence which would probably change the verdict. From their feelings, defendants would do this with a pure conscience in most cases where verdicts *are against them. Hence, courts [83 of chancery, before they order a cause to be reheard at law, require that the complainant shall show that he used due diligence in preparing and conducting his defense at law, and that he was

prevented from making them by circumstances beyond his control."

The same doctrine is recognized by the Supreme Court of the United States, in Marine Insurance Co. *v.* Hodgson, 7 Cranch, 336. Chancellor Kent, in Duncan *v.* Lyon, 3 Johns. Ch. 356, lays it down as "a settled principle, and one by which he intends to continue to be governed, that a party will not be aided after a trial at law, unless he can impeach the justice of the verdict or report, on facts, or on grounds of which he could not have availed himself, or was prevented from doing it by fraud or accident, or the act of the opposite party, unmixed with negligence on his part." In Curtis & Williams *v.* Cissna, 1 Ohio, 435, this court determined it not to be a subject of inquiry in chancery, whether the decision of a court of law, upon a subject within its jurisdiction, was or was not correct. In that case, it is said that "a court of chancery does not act as a court of errors to examine or reverse the judgments of a court of law." And again, "where courts of law and of chancery have concurrent jurisdiction, and a party electing to pursue his remedy in one fails, he shall not be permitted, as a general rule, to re sort to the other." This court also, in Buell *v.* Cross 4 Ohio, 330, determined that where a party has remedy at law, in the prosecution of which he has been defeated by an erroneous decision, he can not be aided in equity. "If he properly failed," say the court, "his rights are at an end; if improperly, his remedy was by error." With these decisions upon the point, one would suppose the profession would consider the question settled; at any rate this court is satisfied with the decisions, and is not disposed to alter them.

It is insisted by the counsel for the complainant that these matters will not avail the defendants on demurrer, but should have been set up by plea; and that they can not even be pleaded without a denial of the fraud, or other circumstances. Reliance, for this, is had upon Mit. Pl. 206–208; whereupon it is urged that inasmuch, as in this case, there is no denial of the *circumstances* and *mistake*, they are all admitted by the demurrer, and so are to be held available. We do not apply the law as the complainant's counsel do. The true inquiry is, are the circumstances admitted 84] by the demurrer, such as, according to *the course of proceeding in chancery, to entitle the party to relief? Apply this rule in the present case. No fraud is alleged, except the fraud of

the court. This court found a verdict, acting as a jury, against the complainant, according to his own agreed state of facts submitted to it; judgment is rendered upon this finding, according to the practice of the court. It is complained of this that the case set forth in the declaration was not the true one, but fictitious, and so made by the complainant's attorney, because he thought it more convenient to state his facts in that manner, and that he stated all the law required! If this be the mistake, or circumstance relied upon, it is the fault of the complainant, for which this court will not afford him relief.

Again, it is complained that the ground of the judgment was the want of an averment of consideration in the declaration, when in truth there existed a consideration that might have been averred. The agreement of facts set forth in the bill admits "that no consideration passed from Green to Dodge and Cogswell on account of said note." Did the complainant admit a falsehood to get his cause tried, and does he now ask to be relieved from his false admission?

It is still further objected that the court, before it gave judgment, assured the attorney that it should be so entered as not to operate as a bar, when, by mistake, the judgment was otherwise entered. It is believed this is the first application to chancery to set aside a judgment at law, because of fraud or misrepresentation in the court rendering that judgment. But what are the alleged circumstances? The court refused leave to *amend* after the cause was submitted, and observed to the counsel asking leave that the judgment would be entered in a way not to operate as a bar! The parties voluntarily submitted their cause upon agreed facts to the court; on the facts, the court found a verdict for the defendants (see 2 Ohio, 439); upon which judgment followed, of course, and now the plaintiff asks to set aside the judgment, because the defendant did not choose to move for a nonsuit, or in arrest of judgment; because his own counsel stated a fictitious, instead of the true case; and because *the court*, without motion in conversation, undertook that the judgment should be entered, so as not to be a bar! And because, upon some unknown ground, the court overruled a motion to amend the judgment at a subsequent term. See Ohio, 486. These facts, it is claimed, are to be *taken as true, because admitted by the demurrer. A de- [85
murrer admits only what is well pleaded or set forth. A *court*

acts upon matters before it; it can hold no conversation—it enters into no contracts to do business, and it can only speak by its record. The legal maxim is, that they import absolute verity, and can not be contradicted; hence, a claim to set up facts in opposition to the record, as in this case, has no legal effect, even if demurred to. The conversation, if any, in this case, must have been with a judge of the court, not the court; and if he undertook to take care of the complainant's rights, it was as his agent, and his laches, like that of other agents, are chargeable upon the principal.

The analogy claimed to exist between this case and that of Oliver and Baum *v.* Pray, 4 Ohio, 175, is not perceived by us. The judgment, in that case, was deemed unconscionable, and the *mistake* on which relief was given, was that of the clerk, in the discharge of his duties as an officer or agent of the law, in taking the appeal bond, when the complainants, so far as they were in pursuit of their legal rights, acted "*with perfect good faith and with all reasonable diligence.*" Id. 194. That case goes as far as we are disposed to go. The demurrer is, therefore, well taken.

On the merits the case made lays no foundation whatever for a decree against Cogswell, and as to him it is dismissed with costs. John Dodge, it appears, received from Sidney Dodge, certain claims to be applied to the extinguishment of the complainant's debt, a part of which only have been so applied. He admits the receipt of two hundred and twelve dollars and two cents, which remains unapplied; and he holds this money and the uncollected demands in trust for the complainant. The exact state of the outstanding demands is not made known to us; nor are we advised when the two hundred and twelve dollars and two cents were received, or might have been paid over. A master will, therefore, unless the parties agree, be required to take and state an account of this fund, showing the amount received, the date of the receipt, and the time when it might have been paid over; also, the present condition of the remaining claims, and if any, what portion of them have been lost by the negligence of John Dodge. The cause must be continued for further proceedings.

*H. and G. Bixbee v. State of Ohio. [86

Two indicted of a joint offense, court may order a joint trial, though a separate trial be demanded by one.

Where several defendants are indicted of a joint offense, and all put upon a joint trial, each must be allowed his separate peremptory challenge of jurors.

This was a writ of error reserved for decision in the county of Huron. The original case was an indictment containing several counts, charging H. and G. Bixbee with shooting R. Prior and P. McCormick, with intent to kill and wound. When the cause was called for trial, the accused claimed each a separate trial, which the court refused to allow. In selecting the jury, G. Bixbee challenged one juror, with which juror, H. Bixbee declared himself content, and insisted upon retaining. The challenge was allowed. H. Bixbee then challenged another juror, whom G. Bixbee insisted to retain. This challenge also was allowed. Both the accused then united in challenging a third juror, and claimed to be allowed two peremptory challenges for each; but the court decided that they could only have two peremptory challenges between them. They were tried, found guilty, and judgment rendered against them, to reverse which this writ of error is brought.

The case was submitted without argument.

Judge Lane delivered the opinion of the court:

There are certain offenses which can not be committed by more than one individual, consequently two can not be presented of such, in one indictment., 1 Chit. Crim. L. 267. But wherever offenses may be committed by several, they may be united in the same accusation. Id. 270. When the joinder is permitted the court is authorized, at its discretion, to try them together or separately, as will best advance the ends of justice. But in the exercise of this discretion the court will be careful that the rights of the prisoner are not jeopardized by the joinder. In the case before us the court directed a joint trial, and we can not interfere with this discretionary power unless some injury be shown to have followed. The record furnishes no proof of error in this particular.

On the subject of the challenge it is the right of each individual accused of a crime, that the tribunal to whose adjudication his rights are submitted, shall be impartial. It is not the right, that any 87] particular set of men shall be his triers, but that *those selected for the office shall be such as possess the requisite qualifications of impartiality. This right seems sufficiently maintained, by allowing the power of exception, without yielding to him the privilege of insisting that the persons shall compose the jury who may be first called by the sheriff. This principle, when applied to this case, would be sufficiently maintained by conceding to each defendant the power of exercising all his challenges, both peremptory and for cause. The statute evidently contemplates this power. It gives, by section 14, the peremptory challenge in civil cases to *each party;* but, by section 15, *every defendant* may exercise it in criminal trials. 29 Ohio L. 98. As the court did not, in this case, allow every defendant his two peremptory challenges, we believe they committed an error.

The right of separate trial, in ordinary cases, does not appear to us to be a consequence of this right of separate challenge. In capital cases, where the panel must be laid before the prisoner, before the trial, and the jury must be composed from it, except for cause, it would perhaps be difficult to secure each his privileges, except by a separate trial, if demanded. But in other indictments, all is granted which the prisoner can justly claim, by the concession of the privilege of exception.

Judgment reversed.

The Lessee of Hart's Heirs v. Thomas Johnson.

Lease of school lands under the law directing leases to be granted for ninety nine years, renewable forever, reciting the law under which it was executed, is to be construed a lease according to the statute, though in terms it imports a conveyance in fee.

A defendant in ejectment having purchased a lessee's interest, as for a forfeiture, can not impeach the validity of the lease against the heirs of the original lessee.

Judgment and execution in the name of the treasurer of the township, instead of the trustees as directed by law, can not be held void, but voidable only.

Hart's Lessee v. Johnson.

An entry to forfeit leasehold estate for non-payment of rent, must proceed for the entire tract of ground leased, without reference to sub-leases of part.

Where the whole case is before the court, and in its opinion a plaintiff has rightly recovered, a new trial should not be granted, though at the trial a point of law had been incorrectly ruled against the defendant.

THIS cause was tried on the last circuit in the county of Perry, a verdict found for the plaintiff, and reserved for decision in this court on a motion for a new trial.

*The ancestor of the plaintiff's lessors, Thomas Hart, on [88 November 16, 1816, received a lease of the northeast quarter of section 16, granted by Congress, for the use of schools, in 1802. This quarter section contained one hundred and fifty-eight acres, then situated in the township of Pike, in the then county of Fairfield, now county of Perry. The lease to Thomas Hart was executed by the trustees of said Pike township, under the provisions of section 3 of the act, entitled "an act authorizing the trustees of the original surveyed townships in the county of Fairfield, to grant permanent leases for their reserved section, No. 16, within said county," which, among other things, authorizes and requires the trustees to grant permanent leases of said section, when laid off into lots, for *ninety-nine years, renewable forever*. Thomas Hart, on April 19, 1819, conveyed to John Hume fifty acres of the said quarter section. The lands in controversy are one hundred and eight acres, the *residue* of the said northeast quarter section, to which the plaintiff's lessors claim title, as heirs at law of Thomas Hart, under the lease of November 16, 1816. The heirship of the plaintiff's lessors, and the possession of the defendant, were admitted on the trial.

H. STANBERY, for the plaintiff.

W. W. IRWIN and J. B. ORTON, for defendant.

Judge WOOD delivered the opinion of the court:

The plaintiff's counsel, in evidence to the jury, in support of the plaintiff's title, offered to read the lease. The defendant's counsel objected to this evidence: 1. Because the lease conveyed an estate in *fee simple*, and not for ninety-nine years, renewable forever, in the words of the act; 2. Because the plaintiff had not shown the performance of all the conditions which the law im-

posed, before the trustees were authorized to make the lease, to wit: that the consent of a majority of the inhabitants of Pike township had been obtained, in writing, and delivered to the county commissioners; 3. That the commissioners appointed three freeholders, who laid off the section into lots, and returned a plat of the survey to the clerk of the township; 4. That the freeholders appraised the lots, and returned their appraisement to the trustees, and that it was recorded by their clerk.

89] *To determine the first point it is only necessary to refer to the terms of the lease and the statute under which it was made. The lease recites the act, and contains these words: "Commencing on May 1, 1816, agreeably to the above-described act, subject, however, to all the provisions in the before-recited act contained." The statute itself is by the parties referred to and made part of the lease. As such, it will restrain or control its meaning and operation. *Id certum est, quod certum reddi potest*, is a maxim which may, with propriety, be applied to this conveyance; and although it may, at first view, appear to pass an estate in *fee simple*, yet when, by the agreement of parties, we take the act under which it was made as a part of the lease itself, it requires no very great penetration to discover that the estate conveyed is only a *freehold* for ninety-nine years, renewable forever. This objection has been separately noticed, because it does not exist in fact. Counsel have mistaken the terms of the conveyance. The other objections, which have been ably urged to the admissibility of this lease in evidence, in our opinion, have no application here.

The defendant claims title to the premises under a sale of the same made by the trustees of Pike township, for the non-payment of the rent by the ancestor of the plaintiff's lessors. The ancestor's legal, quiet, and peaceable possession under the lease is not denied. If the ancestor, therefore, had no title the defendant took nothing by his purchase, and the ancestor having the *prior* legal possession, the plaintiff is entitled to recover. The defendant claims, then, under the ancestor's lease. It is said in the books a party is estopped from gainsaying a title which is recognized in a deed under which he claims. Cox, 432. It is also said that where both parties claim title, even under the same defective survey in ejectment, the defendant shall not take advantage of the defect. 3 Caine, 188. It would therefore appear, if such be the law, and it is supported by high authority, that whether the conditions, on

which the trustees were authorized and required to execute the lease to the ancestor, were performed or not; indeed, however defective that title may be, the defendant claiming under it is, in this suit, estopped from denying its legality. It follows, then, as our opinion, that no error intervened in admitting this lease to be read in evidence to the jury.

The defendant, to prove his title, then offered in evidence the transcripts of two judgments of a justice of the peace, *ob- [90 tained in the name of the treasurer of the township of Pike, the first in 1822, the last in 1824, against the ancestors of the plaintiff's lessors, for the non-payment of the rent; an entry on the transcripts, that execution was issued and returned *nulla bona;* and a copy of the records of the township of Pike, in which was an entry, that the trustees had given the notice and sold the interest of the said Thomas Hart to the one hundred and eight acres of land to Thomas Johnson, the defendant.

The plaintiff objected to the admission of the transcripts in evidence, on the ground that the judgments were entered in the name of the treasurer of the township of Pike, and not in the name of the trustees, as required by the act, which objection was sustained. Did the court err in rejecting this evidence?

This is an attempt to divert an estate for a *forfeiture*, and every step which is taken for such a purpose is required to be in strict conformity with the law. It is true there is a class of cases of a different description, and where the court have established a different doctrine. Barrell *v.* Reed, and Miller *v.* Commissioners of Montgomery County, 1 Ohio, 272, are cases where a bond was given, in each case, to an officer different from what the law required. In these cases, however, the suits instituted were to enforce the contracts the parties had made, on a good and legal consideration. To enforce them was compelling the defendants to perform that only which they had agreed to do. This case, it is claimed, is different. The lease of Thomas Hart was with the trustees of Pike township. They were the persons required by the act to be plaintiffs in a suit for the rent, and the only persons to whom the *promise* was made. There is no privity of contract between Thomas Hart and the township treasurer. There is no *statutory* provision nor *common law* principle which would enable him to maintain the action. Thomas Hart did not, however, take advantage of the illegality of these proceedings. He stood by,

suffered judgments to be obtained, and the trustees to avail themselves of the judgments. The court is of opinion it is now too late to question their legality. Those transcripts, therefore, were, in our view, admissible evidence.

The plaintiff, then, objected to the admissibility of the township records to prove the security, notice, and sale of the land in controversy, to the defendant, because the trustees did not enter on, give notice of, and sell the *whole* northeast quarter leased to the 91] said Thomas Hart, and not *one hundred and eight* acres *only, which objection was sustained by the court. Let us inquire if the court erred in overruling this testimony?

The act provides that section 16 shall be laid off into lots of not *less* than *forty*, nor *more* than *one hundred and seventy* acres each. In leasing these lots, there is no provision in the statute by which they may be subdivided. They are to be leased in whole lots, as they are laid off. The whole lot is liable for the payment of the rent. When the rent is not paid, the trustees, after suit brought and execution returned *nulla bona*, are to enter on *the* lands, and to sell *the* right of the lessee in *such* lease. They are not authorized to sell a *part* of the lessee's interest, nor to enter on a *part* of the land. The law clearly negatives the idea of any *subdivision* of the interest of the lessee. Thomas Hart was the lessee of the whole one hundred and fifty-eight acres. The trustees could take no notice of the lease by Hart to Hume; that was between the parties to the lease. It was, therefore, the duty of the trustees, if the rents were not paid, to enter upon and sell the *whole one hundred and fifty-eight acres*, or the *whole of the lessee's* right to it, and not his interest in the *one hundred and eight acres* only. Not having done so, their proceedings are contrary to law, and convey no title to the purchaser, the defendant. This evidence offered, then, was properly rejected.

The question only then remains, ought the court to grant a *new trial?* It is a general rule that when evidence competent, and which would conduce to prove the issue, has been rejected, a new trial shall be granted. But is not this case an exception to the rule. The defendant's counsel has disclosed all the evidence he has, or ever can have, on the trial of this cause, to prove *his* title. It consists, not only of the transcripts which were rejected,

but of the subsequent proceedings to consummate the sale to the defendant. Suppose a new trial granted, and the transcripts read in evidence to the jury, would it aid the defendant? It certainly could not. The court must still reject the evidence of the sale, and without this, the defendant has no color of title. For what purpose, then, shall a new trial be granted? Shall it be to admit the transcripts? to reject the subsequent proceedings? to instruct the jury that the defendant has no title in law? and finally to produce the same result which has already taken place—a verdict for the plaintiff—and which must *inevitably* follow! It would be idle in the extreme.

Motion denied.

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*H. D. Howard's Administrators *v.* Gregory Powers. [92

In suits against administrators, a count upon an indebtedness and promise by the administrator, *as such*, may be joined with one upon an indebtedness and promise of the intestate, provided the consideration of the demand spring from or was connected with the estate.

Error to the common pleas of Portage. Powers declared in the court below, in three common counts in *assumpsit*.

1. Upon an indebtedness by the intestate, and a promise by him.

2. Upon a like indebtedness, and a promise by the administrator.

3. Upon an indebtedness of the administrator, *as such*, and a promise by him, *as administrator*.

On a general demurrer to this declaration, the court below gave judgment for the plaintiff. To reverse which, this writ is brought.

V. R. Humphrey, for the plaintiff in error, contended there was a *misjoinder* in the case; the first two counts seeking to charge the plaintiffs in error, in their *representative* character, and the third, in their *private* capacity. He made three points:

1. A "plaintiff shall not have an action against another to charge him as executor, and also in his own right; for the judgment in one case is *de bonis testatoris*, and in the other *de bonis propriis.*"

As to this point he cited 2 Saund. 317, n. *d*; 1 Chit. Pl. 205; 4 Term, 347; 2 B. & P. 424; 12 Johns. 349; 7 Cowen, 58; 17 Mass. 464.

2. That the misjoinder is not helped by the allegation, in the third count, that the defendants become indebted *as administrators*, and promised *as administrators*, because an indebtedness accruing after the intestate's death, must be upon their *individual* contract, upon which they can only be liable in their *private* capacity.

3. The party may avail himself of this misjoinder upon a writ of error.

G. Powers, Jr., contra, cited Judge Burnet's opinion, in 2 Ohio, 163.

Judge Wright delivered the opinion of the court:

The question of misjoinder is the only material one raised upon 93] this *record; and we think if, in any case under our laws, an administrator can be held liable in *indebitatus assumpsit*, in his *representative character*, upon a promise by him, as such, where the consideration arises after the death of his intestate, then there is no misjoinder in this declaration. It is not our purpose to go into a full examination of the authorities referred to, or to attempt a reconciliation of conflicting ones.

The Supreme Court of Pennsylvania, in 13 Serg. & R. 441, adjudged it no incongruity to join a count upon an assumpsit of the intestate, in his lifetime, with one on an undertaking of the administrator, after his death, when the same judgments can be given in both. Chief Justice Tilghman in that case says: "The rule of law is, that the judgment is the criterion as to joining of counts. There can be no different judgments in one action, but counts which require the *same* judgment may be joined." If this is the true test, and we think it is, the provision of our statute, that in *all cases* against an administrator the judgment shall be of the assets of the intestate, would seem to favor this joinder. The same court, in 12 Serg. & R. 99, sustained an action on an implied prom-

ise by an administrator, *as such*, for money paid, laid out, and expended, for his use *as administrator*, in consequence of a payment by the plaintiff *after the death of the intestate*. The court say: "An implied promise arises out of, and follows the nature of the consideration, which in this case was the actual payment of money to the administrator, *as such*, and there is, therefore, no great technical absurdity in implying a promise by him in the character in relation to which the money was paid to his use."

It has long been the practice for an administrator to join, in the same suit, a promise to his intestate and a promise to himself, and also to join a count, upon an indebtedness and promise to the intestate, with one upon an indebtedness to the intestate, and a *promise* to the administrator. Remembering that the *promise* is the gist of the action, it is difficult to distinguish the legal consequences of such a case from the one at bar. If the recovery *must*, in all cases, follow the undertaking, it would, in the latter case, be in favor of or against the administrator, in his *individual* and not in his *representative* character. It is said, however, this is allowed to avoid the statute of limitations! Then it would seem to follow that you may lawfully violate a principle of the common law in order to defeat the operation of a *statute of repose*, while you are restrained from *varying a rule of mere practice, when by so [94 doing you reach the ends of justice! The principle in the two cases, in our opinion, is the same, and ought to be applied accordingly. We concur with Chief Justice Gibson, in Pennsylvania, 12 Serg. & R. 100, that "the same convenience which requires such a form of declaration to be supported, where it is employed to elude the statute of limitations, equally requires it to be supported in cases like the present. At all events it is entirely within the power of this court to establish a precedent for itself."

An administrator may sue, in his representative character, in all cases where the money, when recovered, would be assets. 1 Term, 487; 3 East, 104; 3 Term, 659; 1 Saund. Pl. & Ev. 606; 6 East, 405; 6 Taunt. 453; Salk. 207. So in Beall *v.* Palmer, 2 Levinz, 165, it is held that "as to contracts entered into with themselves, they may sue in all cases where the money, when recovered, would be assets." Will not the rule hold equally good that the administrator may be sued, as such, in all cases where the assets of his intestate are directly or indirectly sought to be charged? At any rate, it seems to us the administrator has no

ground to object against a recovery of him, in his representative character, that the judgment should have been against him in his individual character.

Suppose (and it is urged that the case supposed is the real case before the court), that the intestate contracts to sell land, to receive his pay by installments, and to make a deed when the payments are completed. Some of the installments fall due in the life of the intestate, and are paid to him, others, falling due after his death, are paid to his administrator, and it is subsequently discovered that the intestate's title is defective. The purchaser has a legal right to abandon the contract, and recover back the purchase money and interest. Was not the money paid to the administrator received by him, in his *representative capacity*, for the use of the purchaser, and can he be made liable in law *to refund in any other capacity than the one in which he received it?* If the estate is insolvent, and the administrator has disbursed these assets in the due course of administration, can he be made liable *as an individual, when in that capacity he has done nothing?* A rule of law that would so subject an administrator, without fault, would be palpably unjust, yet he would be so liable if the transaction be held his *personal contract.* In the case supposed, the money was

95] received by the *individual *as administrator; as an individual he had not a shadow of claim to it;* he paid it away again under the direction and sanction of the law, with the superadded obligation of his oath of office. Upon no principle of equity or justice can he be holden, *as an individual*, to answer for it.

But it is urged that the declaration, in this class of cases, should be special, and contain a full statement of the facts relied upon for a recovery. Why should this case be an *exception* from the general rule? Doubtless, a plaintiff in assumpsit *may* set forth his *whole case* in the declaration with particularity, taking care to show a valid promise as the basis of his claim. Yet the liberal principles which govern the action dispense with that particularity in cases where, upon a general state of fact, the law raises an undertaking, leaving the particulars to be disclosed by proof, on the trial. It is sufficient to set forth such facts, as, when proved or admitted, will warrant the court in drawing the legal inference in favor of the plaintiff. It will be obvious to the skillful pleader, that the common count in assumpsit, with the facts necessary for its support proven at the trial, secure to the plaintiff as perfect a

right to judgment, as if the same had been first particularly set forth in the declaration, and then proved at the trial. And this general mode of declaring can not take the adverse party by surprise, or be productive of injury; for he has a right to demand and receive, before he can be compelled to disclose his defense, a full bill of the particulars which are relied upon against him. On the other hand, to compel the plaintiff to declare specially upon his contract, might involve him in difficulty, and lead to great injustice. In the case supposed, if the plaintiff counted upon the special contract, he would be under the necessity of fully completing the contract on his part, in order that he might aver performance in the declaration, and prove it on trial, as essential to his recovery; and if the defective title of the vendor was discovered before all the purchase money was paid, he would be required to pay the balance of the purchase before he could resort to his action to recover it back. And if, in such case, the estate should prove insolvent, he would thus be compelled, unjustly, to contribute to a fund for the general creditors, having a right to recover back only a *pro rata* dividend. Why should the law work such injustice, and that, too, in an action where it is said you may recover according to the very right and justice of your case? Again, if, in ordinary cases, a purchaser *may rescind his contract when the [96 title fails, and resort to the common count in assumpsit, to recover back the purchase money paid, what good reason can be urged for a change of rule, increasing the difficulty of recovery after one of the parties is dead, and his interest intrusted to a representative, necessarily less familiar with it?

It appears to us that justice will be promoted by sustaining this practice—that its sanction violates no legal principle, and can work no injury. We accordingly hold that a demand, the consideration of which springs from, or is connected with the estate of an intestate, though arising after his death, may be joined in the same suit with a demand, the consideration and promise of which was complete in the lifetime of the intestate. The judgment of the court of common pleas is affirmed, with costs.

EXECUTOR OF O. BIGELOW *v.* ADMINISTRATORS OF E. BIGELOW.

Declaration avers indebtedness in 1818. Plea of the statute of limitations. Replication, demand in 1827. Demurrer to replication. Held, that cause must be decided on the pleadings, and that the statute operates.

Fact that plaintiff, as executor, was trustee, can not, at law, take the case out of the statute.

Causes of action accruing under laws repealed, if barred by those laws while in force, continue barred by them; if not barred during their continuance, shall nevertheless be limited by them.

THIS was an action of assumpsit, adjourned for decision here from the county of Licking. The writ bore test, March 28, 1831, and the declaration contained two counts. The first for money had and received, as follows: That on November 25, 1818, the said Elihu Bigelow, as the administrator of the said O. Bigelow, was indebted to said plaintiff in the sum of one thousand dollars, for so much money by the said Elihu Bigelow, as administrator as aforesaid, before that time had, received to and for the use of said plaintiff, as executor as aforesaid; and being so indebted, he, the said Elihu, as administrator as aforesaid, afterward, to wit: on the day and year last aforesaid, promised to pay said plaintiff, etc.

Second count, for money lent; similar to the above.

97] **Breach.* That the said Elihu in his lifetime, and the said defendants since his death, have refused to pay to plaintiff, etc.

Pleas: 1. General issue.

2. Statute of limitations, as follows: And for further plea in this behalf, the said defendants, by leave, etc., say, that the plaintiff, as executor as aforesaid, ought not to have or maintain, etc., because, they say, that the said Elihu, deceased, did not at any time, within six years next before the commencement of this suit, undertake and promise in manner and form, etc.

The replication to third plea is as follows: That the said plaintiff, as to the said plea thirdly, etc., saith, *precludi non;* because, he saith, that within six years next after the said several causes of action in the said declaration mentioned, accrued to him, the said plaintiff, to wit: on May 28, 1827, he, the said plaintiff, demanded the said several sums of money, in the said declaration mentioned, of and from the said defendants, then being adminis-

trators as aforesaid; and then and there requested them to pay the same unto him, the said plaintiff; but the said defendants did not nor would then pay the same, or any part thereof, to the said plaintiff, but then and there neglected and refused so to do; whereupon, the said plaintiff, afterward, and within six years next after the demand aforesaid, to wit: on March 28, 1831, at the county of Licking aforesaid, sued out his writ of summons aforesaid, to recover the moneys above demanded, last aforesaid; and this he, the said plaintiff, is ready to verify; wherefore, etc.

General demurrer to this replication.

GODDARD and DILLE, for plaintiff.

H. STANBERY, for defendants.

Judge LANE delivered the opinion of the court:

We have not deemed it necessary to notice minutely the form of the pleadings in this case, but have directed our attention to the facts appearing on the record. The plaintiff's case is contained in his declaration and replication. He avers that the indebtedness accrued in 1818, and alleges the demand to have been made in 1827. The plaintiff was not bound to rely and repose upon the dates set forth in his pleadings. He might, by *a different [98 course of pleading, have set forth facts to show that there was no interval of six years without some act intervening to interrupt the operation of the statute. In the absence of any such allegation, the court must take the case as the existing pleadings present it, and inquire, if upon the facts stated, the statute of limitations cut off his right to recover.

The statute of limitations of 1810 was in force at the time this action accrued. In express terms, it binds the right of the plaintiff, unless the suit was commenced within six years. We must find something in the case which prevents the statute operating, or the defense prevails.

It is claimed that this is a trust against which the statute of limitations does not run. We understand this to be the doctrine in a court of equity; but no effect can be given to it in a court of law, where the statute binds by its direct application. In a court of equity, the statute has no binding force by its own effective force, but is only adopted and applied by analogy to cases within

what is considered its reason. Chancery has held it not to apply to direct trusts, as beyond the analogy and reason of the statute. But no operative effect can be given to this principle in a court of law, because it can take no cognizance of the trust. If relief were asked in equity we might then apply the principle; but at law the statute is inoperative.

It may, however, be insisted that the statute of 1810 is repealed, and that its operation on causes already barred, is not saved by the reservations of the saving clause of the subsequent and existing statute, and, consequently, that the statute of 1831, not that of 1810, must govern the case. The proviso in the repealing clause of the statute of 1831 is somewhat obscurely worded. We believe its interpretation to be, that all causes of action accruing under former acts, not barred at that time, shall be limited by those acts; and all causes of action that have been barred by those acts shall continue barred. If, then, this cause of action accrued in 1818, it was barred in 1824, and was not revived by a demand in 1827.

Judgment for the plaintiff on the demurrer.

99] *GEORGE RUMBARGER v. FREDERICK STIVER.

Scire facias against an executor to charge him personally, recites receipt by him of three thousand dollars, for which he had not accounted. Plea that defendant had fully administered, that he had no assets in his hand when *sci. fa.* was sued, and that he did not receive three thousand dollars as alleged in *sci. fa.* The plea adjudged bad on special demurrer, both as insufficient and for duplicity.

THIS cause was reserved for decision here in the county of Montgomery.

The *scire facias* issued in this case recites, that the plaintiff recovered a judgment in the Supreme Court for the county of Montgomery, at the June term, 1826, against the defendant, as surviving executor of Caspar Stiver, sen., deceased, for seven hundred and twenty-two dollars damages, and one hundred and two dollars and seventy-two cents costs of suit; that an execution was issued,

which was returned "no goods nor chattels, lands or tenements found, whereon to levy."

The *scire facias* next recites, that three thousand dollars came to the hands of the defendant, as executor of the said Caspar, deceased, which was more than sufficient to pay the plaintiff's judgment; that more than five years had elapsed, and the defendant had not settled the estate, but had *wasted* the assets, which came to his hands, as executor; and that the plaintiff's judgment is unpaid and unsatisfied.

The *scire facias* then prays for execution, *de bonis propriis*, of the defendant. The court of common pleas render a judgment by default, for execution, against the defendant, *de bonis propriis*; from which judgment the defendant appealed.

The defendant, by consent, since the appeal, has filed a special plea, and, as a defense to the *scire facias* insists in his plea: 1. That he has fully administered. 2. That he had not any assets in his hands when the *scire facias* was sued out. 3. That the three thousand dollars mentioned in said *sci. fa.* never came to his hands, as executor, and that he had not wasted the estate of the testator.

To this special plea, the plaintiff demurred specially, and the defendant joined in demurrer. The plaintiff assigned several causes of demurrer, *two* of which only were considered by the court: 1. That the defendant had not denied but what he received assets to a *less amount* than three thousand dollars, and sufficient to pay the said judgment. 2. That the plea was bad for *duplicity*.

H. STODDARD, for plaintiff.

*CRANE and SCHENCK, for defendant. [100

Judge WOOD delivered the opinion of the court:

To make a good plea, it must be: 1. Direct and positive, and not argumentative. 2. It must be single, and contain but one matter, because duplicity begets confusion. 3. It must have convenient certainty of time, place, and persons. 4. It must be so pleaded as to be capable of trial. 5. It must answer the plaintiff's allegations in every material point. 3 Bl. Com. 308.

Try this plea by these rules. The defendant denies that three

thousand dollars came to his hands, as assets, but does not deny that a *less sum*, and *sufficient to pay the plaintiff's judgment*, came to his hands. The plea, then, has not that certainty which the law requires. It does not answer the plaintiff's allegations in every material point. It is not a sufficient answer for the defendant to say, I did not receive three thousand dollars, but he must aver that no part of that sum came to his hands; for he is as much liable under this *sci. fa.* for *any* amount which came to his hands, as for the gross sum stated.

It is a rule of the common law, that the plea should not be *double*. It is a rule, says Chitty, founded on principle. It would be vexatious and unnecessary to put the opposite party to litigate and prove *two* points, where one would be sufficient to establish the matter in issue; and although the statute permits several pleas, there is no authority for putting several distinct matters in the same plea.

This plea avers: 1. That the defendant has fully administered; 2. That he did not receive the three thousand dollars; and, 3. That he has not wasted the estate. As set forth and embodied in this plea, they are distinct substantive allegations, and the plea is, consequently, bad for *duplicity*. The demurrer is sustained.

101] *SMITH ET AL. *v.* HEUSTON ET AL., COMMISSIONERS OF BUTLER COUNTY.

Individual holders of lots around a square conveyed to the county, for the use of public buildings and a court-house, have not such individual interest in the ground as will authorize chancery, on their application, to enjoin county commissioners from leasing portions of the ground to individuals, reserving rent to the county.

Such persons have no right to proceed in chancery to enforce the public right to such ground.

IN chancery, from Butler. The county of Butler was erected in 1803, and commissioners were appointed to fix the seat of justice therein. Before the place of the seat of justice was agreed upon, the proprietor of the town of Hamilton proposed to the commis-

sioners, in writing, in case that town should be selected as the site, "to give, *for the use of the county*, a square for public buildings, agreeably to a plan of the town, etc.; also a square for the church and burying ground, consisting of eight town-lots, together with the commons in front of the town, for *public uses*, such as boat-yards," etc., and to "pay two hundred dollars toward erecting of public buildings or court-house." The county seat was established at Hamilton and the two hundred dollars paid by the proprietor; but before the square for the public buildings was conveyed he died. A conveyance was afterward ordered by the court of common pleas, in execution of the contract; in pursuance of which the representatives of the proprietor made a deed to the commissioners of the county, conveying said square to them, *for the use of public buildings for the inhabitants of the county of Butler.*

The bill, after setting forth the foregoing facts, alleges, that the county commissioners have expended large sums of money in erecting a court-house, and other public buildings, in consequence of which the lots near and around the square increased in value, when the complainants, relying on the good faith of the county commissioners, became interested in some of them. That the county commissioners, in order to injure the complainants, and to deprive the inhabitants of the benefit of the donation, have resolved to lease the corners of the square for a term of years, for private purposes, and advertised to receive proposals for such leases; that the leases, if made, will forfeit the whole square to the heirs of the grantor, and violate the public faith and individual right. The bill prays an injunction to stay the proposed leases.

The defendants demur to the bill.

*J. Woods, for the defendants, made the following points: [102

1. That the defendants are sued as individuals, not as a corporation.

2. That there are different injuries complained of in the bill, which can not be joined.

3. The injuries complained of are several to each of the defendants, for which each has his remedy at law.

4. That no forfeiture will follow the leasing proposed.

5. That inasmuch as the county commissioners have expended large sums in ornamenting and improving the grounds for the advantage of the complainants, the same power they had to do that

authorized them to use the ground for the benefit of the public, and to give leases, with a view to the public advantage arising from the rents.

He cited 5 Ohio, 204, as conclusively showing the power to lease.

A. H. DUNLEVY, contra, cited 1 Cooper's Eq. 40; 2 Mad. Ch. 144; Redes. Tr. 145; 3 Munf. 358; 29 Ohio L. 351.

WRIGHT, J., delivered the opinion of the court:

Unless the complainants have a right, as individuals, to interfere to protect county property conveyed to it for the use of public buildings, and restrain the county commissioners, the agents of the county, from using such property as in their judgment may best promote the object of the grant and the public interest, the bill must be dismissed. The right to interfere is sought to be sustained from analogy to the class of cases where one of many commoners or parishioners seek to restrain from infringing the common right, or to establish a general *modus*. The analogy, in our opinion, does not hold. In those cases the right to proceed depends on the fact that each commoner or parishioner is injured in his *individual rights*. In another class of cases, where a great number are separately interested in the same subject, one or more, for convenience, and to prevent delay, may litigate the right in chancery, for himself and all others interested; and the court, having the subject and the parties operating before it, will so control as to protect the rights of all concerned. The case before us does not, in our opinion, belong to either of these classes.

The present is an attempt, by two or three individuals, to enforce the rights of the county, and guard the county property 103] *from forfeiture. This court, in Putnam *v.* Valentine, 5 Ohio, 189, has determined, that "rights purely public are to be enforced in the name of the state or the officer intrusted with the conduct of public suits." If the rights of the county of Butler are violated or threatened, redress must be sought in the name of the county or its acknowledged agents. 5 Ves. 29; Swans. 244; 5 Ohio, 189. The case relied upon by the complainants' counsel, in 3 Munf. 358, was brought by Murchie, a surviving trustee of Manchester, to prevent an injury to the *common right* of the inhabitants of the town. There is no pretense in the bill that the complainants have any individual interest in this square, as ten-

ants in common or otherwise, which they ask us to protect. They are mere volunteers to take charge of public or county interest, without ever having been intrusted by the county with the performance of such duty. They ask to be permitted to act for the public without offering any reason for taking the business from the public agents. If the court was right, in 5 Ohio, 189, in deciding that a supervisor of highways had no authority to proceed in chancery to restrain from the destruction of a public highway, the right of the complainants is much less apparent. The bill must be dismissed. The leave asked to amend, would not avail the complainants if granted.

The court designedly leaves untouched the right of the commissioners to lease the ground, as proposed.

SETH GROSVENOR & CO. *v.* ADMINISTRATORS OF S. AUSTIN AND C. AUSTIN.

Creditor may maintain a bill in chancery for distributiou of decedent's assets, against executor or administrator, before obtaining judgment.

The separate individual creditors of one deceased member of a firm can not claim a preference in the decedent's individual estate, against the creditors of the firm.

THIS was a bill in chancery, reserved for decision here in the county of Geauga. The facts, in brief, were these: Seymour Austin and Calvin Austin had transacted business in partnership, as merchants. Both were deceased, and both deceased insolvent. There were no funds of the firm, but Seymour Austin left individual separate property. The complainants, *creditors of the firm, [104 filed a bill in chancery, against Seymour Austin's administrator, for a distinct share of his individual effects. The individual and separate creditors of Seymour Austin interposed a claim to be preferred, and first paid; and this was the point brought up for consideration.

HITCHCOCK, for the complainants:

The only question now before the court for consideration is,

whether the partnership creditors of the late firm of Calvin Austin & Co. shall be permitted to claim a *pro rata* dividend of the estate of Seymour Austin, one of the firm, who is now deceased.

On examination of the master's report, it will be seen that long before the death of either of the partners, the partnership was dissolved; that the partnership funds are entirely exhausted; that both the partners are now dead; that their estates are insolvent; and unless the creditors of the firm can come upon the separate estate, they are entirely without remedy. It will be further seen that the estate of Seymour has been increased by the amount which he received for his share of the stock in trade at the dissolution of the partnership. Under these circumstances, we are persuaded that the court will not refuse us relief, unless driven to it by some positive rule of law in equity. That no such rule exists, I hope to be able to satisfy the court.

It is urged by defendants' counsel, that the question was determined previous to the order of reference, and this is inferred from the terms of that order. Nothing, however, could be further from the truth. The court directed the particular mode of inquiry, so that, upon the coming in of the report, a final decree could be made upon any hypothesis which the court should think proper to assume. The question is still open, and is one of no little importance, as it relates to the settlement of decedent estates.

It is well established that partnership effects shall be first applied to the payment of partnership debts. This, I apprehend, is rather a rule of equity than of law. But the converse of the proposition will not hold true; otherwise we run into this absurdity, that he who has given credit, upon the joint and several responsibility of two or more, has in fact less security than he who has given credit upon the responsibility of one alone of the number.

In maintaining the proposition, that a partnership creditor can 105] claim his ratable proportion of the insolvent estate of one *of the deceased partners, especially where there are no partnership effects, and where the other partners are insolvent, we assume the principle that partnership debts are, in equity, joint and several; and in law, so far joint and several, that when a judgment is once recovered, the money may be made of the joint stock of both, or of the separate property of both or either. What, then, would have been the situation of the parties in this case were Calvin and Seymour Austin still living? Grosvenor, the complainant, might have

recovered a judgment against the two, and have enforced that judgment against either. Had there been a sufficient fund to satisfy this judgment, belonging to the firm, and at the same time separate judgment creditors, a court of equity would probably, upon the principle of marshaling assets, have compelled the partnership creditor to resort to the partnership fund; but in the absence of such fund, a court of equity would not interfere.

The correctness of this principle is not controverted by the defendants' counsel, as applicable to courts of law, but it is denied as a correct principle in chancery. To us, it seems that they are mistaken. In the case of Hammersly *v.* Lambert, 2 Johns. Ch. 508, Chancellor Kent says expressly, "it is in equity a joint and several debt." And in Gow on Partnership, 460, it is said, "at law, a partnership contract is joint only, but equity adopting the law merchant to its full extent, holds it to be both joint and several." If, therefore, there be a survivor, and the proceeding be at law, that survivor must be sued. But if he can not respond the amount of the judgment, a court of equity will charge whatever remain due upon the estate of the deceased partner. Or if the survivor be insolvent, the creditor may in equity proceed against the property of the decendent in the hands of his representatives, without any suit against the survivor. 2 Johns. Ch. 508; 5 Ohio, 355; Gow on Part. 461.

The authorities cited by the defendants' counsel do not sustain them in the position that the principle or rule of law is more favorable to the partnership creditor than that of equity. If there be any difference it is the other way. But this may be said in truth, that both in law and equity, as well as in common parlance, the individual partners are considered as debtors to the partnership creditor. And so long as the partners or either of them live, the collection of this debt may be enforced through the medium of a court of law; although, in case of the *insolvency of a [106 survivor, it will be necessary to resort to chancery to charge the estate of a decedent.

If, then, such be the effect of the partnership, as to the claims of its creditors upon it, and upon its several members, for their respective dues while the partners are living, shall the creditor lose any of his rights by the death of one of the partners. To enforce those rights, it is admitted that a different form of remedy must be resorted to. But is the right extinguished; or, in other words,

is the individual any less the creditor of the estate of the deceased partner than he was of that partner himself when living?

Upon principle, it would seem to me that his relative rights are the same. It must be recollected that we have no bankrupt law, so that, during the life of all the partners, there is no possible way in this country of preventing the creditor from enforcing his claim against the individuals of the firm, except by a resort to chancery; and chancery will interfere no further than to compel the exhaustion, in the first instance, of the partnership effects. When these are gone, the creditor will be permitted to proceed against separate property. If there are no partnership effects, chancery will not interfere. During the life of the several parties, then, there can, in this country, be no such thing as appropriating partnership effects to the exclusive payment of partnership debts, and separate effects to the exclusive payment of separate debts. If the debtors be insolvent, all creditors may come in for a *pro rata* distribution.

It has, ever since the first organization of our state government, been an invariable rule in the settlement of estates, whether testate or intestate, that in case of insolvency the estate should be divided *pro rata* among the creditors. No preference is given to one description of debts over another, any further than is necessary to secure to the individual care and attention during his last sickness, and a decent burial after his death.

But adopt the proposition contended for by the defendants' counsel, and this principle of equity is destroyed, unless the court are prepared to say that a partnership creditor is not, to a certain extent, a separate creditor; or, in other words, that a partnership creditor can not, under any circumstances, enforce his claim against separate estate. It seems to be admitted by the defendants' counsel, that if there be a sufficiency of assets, both separate and partnership debts shall be paid. But they claim a preference 107] for separate debts. This is an *interpolation upon the statute. That provides that all debts, of whatever description, shall be paid ratably. Counsel made a provision, excluding a certain description of debts, unless all can be paid.

Suppose, for a moment, we adopt their principle. How would it operate in practice? Take the case under consideration with a small variation. Here are partnership and separate creditors and a separate fund. Suppose that fund was sufficient to pay the

separate creditors and leave a surplus, but not sufficient to pay the partnership creditors—what would be done with this surplus? Counsel will say, divide it ratably among those partnership creditors. But why? Upon what principle? Is it because they are creditors to the estate? If they are creditors to the estate, then the statute secures to them an equality, and by adopting the rule contended for by defendants' counsel, both the letter and spirit of this statute would be violated. This will not be done by the court, unless, as before observed, there is some precedent to require it. I apprehend that all the doubt, which can by possibility arise upon this subject, will be found to have originated in certain English decisions under their bankrupt law—decisions which ought not and can not have any influence here, because made under certain statutes which are unknown, as of any binding efficacy, in this country, and intended for a people whose laws for the settlement of estates are dissimilar to our own.

Our law for the settlement of estates is founded in the principles of abstract justice, and the principle for which I contend is equally founded in justice. Grosvenor, the complainant, gave credit to both Seymour and Calvin Austin; he now asks for nothing more than to be placed upon an equality with those who gave credit to but one of these individuals.

Whether, then, we look to the principles of equity and justice, or whether we look to our own positive law for the settlement of estates, it would seem to me that the case upon the question submitted to the court is with the complainant.

How is it upon authority? The counsel for defendant have cited a variety of authorities, both English and American, to prove that partnership effects must first be applied to the payment of partnership debts, and separate effects to the payment of separate debts. Of the American cases, but one gives color to this position, while all the others are against it. Of the English cases, unless I am much mistaken, there is but one that *did not arise under [103 their bankrupt laws, and that is the case reported in 9 Vesey, 118, and in this case the chancellor says, while speaking of the distribution of bankrupt estates, at page 124, "it is extremely difficult to say upon what the rule in bankruptcy is founded." Of the truth of this assertion, any one will be satisfied who will examine the authorities, and, it seems to me, will be led to doubt whether in fact there is any certain rule upon the subject. It is curious to

see the various courses which have been pursued by the different chancellors, according to their different views of justice, and all striving to maintain their positions by precedent.

In the time of Lord Hardwicke, it was allowed to joint creditors to prove under a separate commission against one partner, but they could come in for a dividend only of the surplus after separate creditors were satisfied. Gow on Partnership, 379, supposes this rule continued until the time of Lord Thurlow, who held that the contrary course was best, and allowed joint creditors to take dividends under a separate commission. Gow, 380. And he likened the proceedings in bankruptcy to an execution. Thus it continued until the year 1796, when, in the case of Ex parte Elton, 3 Vesey, 237, the other rule seems to have been restored.

But it will be observed by the court, that all these cases go upon the supposition that there are two funds; and the inference is clear, that if there be no partnership fund, then the partnership creditors may go upon the separate fund. Gow, 381, 382. And the rule as now established in England, if any one can be established, is, that "if there is a *joint fund*, or there are *solvent partners*, a joint creditor is not entitled to prove his debt under a separate commission, for the purpose of receiving a dividend, without the chancellor's order." Gow, 382. But if there be no joint fund, then I apprehend the proof may be made, and a dividend claimed. Gow, 382, 383. Upon the principles then established under the bankrupt laws of England, we should have a right to prove our debt, and receive a dividend from the separate estate, it appearing clearly from the master's report that there is no joint fund.

Under the bankrupt law, as it once existed in the United States, the same would have been the case. The case of Tucker *v.* Oxley, 5 Cranch, 34, is cited by defendants' counsel; for what purpose I can not conceive; for it is an authority, if I can understand it, 109] directly against them. The court are referred *to the opinion of Chief Justice Marshall, commencing at page 39, as conclusive upon the whole subject.

But suppose we should admit that under the English bankrupt law, the complainant could not prove his debt against, and receive a dividend from the separate estate of S. Austin, until separate debts were paid—does it follow that the same rule is to be applied in the settlement of estates, and especially in Ohio, where

the statute has so carefully provided that *all creditors* shall be paid in proportion to their respective demands.

It was not formerly so considered in England. For even there a joint creditor, of equal degree, might come in *pari passu* with a separate creditor. Gow, 437. And so it seems to have been holden until 1803, when the lord chancellor varied the rule, upon the supposed analogy between the case of death and bankruptcy. 9 Ves. 118.

But two American cases are cited upon this subject by the defendants' counsel, which are properly applicable in the point of view in which I am now considering it, and I have not been able to find any others directly in point.

The first is reported in 3 Dessausure, 203, and the other in 5 Serg. & Rawle, 78.

In the first of these cases, it is said by the chancellor to have been settled in South Carolina by repeated decisions, "that the private property is primarily liable to the private creditors, and the copartnership effects to copartnership creditors." Upon what principles these decisions are founded it is not stated, but we know that in South Carolina there is the same rule as to priority of debts as in England.

In Pennsylvania, however, the rule is different. Their statute is substantially like ours; and the court, in the case cited from 5 Serg. & Rawle, decide, that partnership creditors may come in for a share of the separate estate, being careful, however, that there shall be a *pro rata* distribution of all the effects, both partnership and separate. This case, if considered as authority, is decisive of the present question in favor of the complainant. These, as I before observed, are the only two cases directly in point, but, as being relative to the subject, I will refer the court to 5 Ohio, 355; 2 Johns. Ch. 508.

Upon the whole, it will be seen that the question, so far as respects this state, is a new one. That it involves, measurably, the construction of one of our most important statute laws; that there is no precedent which can be considered as obligatory. *And [110 I trust the court will make such a decision as will not only do justice in the present case, but in all others of a similar nature which may arise.

WHITTLESEY and NEWTON, for administrators of S. Austin:

The court, at a previous term, having considered the law and equity to be with the complainant, but being unadvised of the separate and partnership property of Seymour Austin and Calvin Austin, due from them separately, or as partners, ordered that it be referred to the master commissioner, to hear and take proof of the separate and partnership property of said Calvin and Seymour, and that he take an account of the debts due from each separately and as partners.

It appears, from the phraseology of this interlocutory decree, that the court recognized the doctrine that where there were different sets of creditors, each estate should be applied exclusively, in the first instance, to the payment of its own creditors; the joint estate to the joint creditors, and the separate estate to the separate creditors; for, otherwise, it is not perceived why the particular matters contained in the orders were referred at all. The master, at this term, has reported on the several subjects referred to him, and the report is resisted by the complainant, not because the master has mistaken the facts, or committed any error in reporting them; but he resists the report because he contends he ought to be permitted, when he has a debt against a firm, to take the separate property of one of the partners, without regarding the separate debts; or, in other words, he contends, the court should retrace its steps, and, in effect, abrogate its order, overthrow old and well-established principles and adopt new ones. Henry Phelps, one of the defendants, wishes the court to establish the report, and carry out the principle recognized in the interlocutory decree. The rule at *law* is as contended for by the complainant, and a judgment creditor has the right to go upon either estate; but this complainant is not a judgment creditor, and he has come into a court of chancery to collect his debt, without having attempted to enforce it at law; and being here, he is subjected to the rules and principles established by courts of chancery.

It has long since been established as a rule of that court that where there are different sets of creditors, each estate shall be applied exclusively, in the first instance, to the payment of its own 111] creditors, the joint estate to the joint creditors, and the *separate to the separate. Watson on Partnership, 195, top page, and in 265 on the margin.

A creditor is not only confined to the particular estate, the more

effectually to protect the rights of other creditors who may have debts to be enforced against a different estate, but he is confined to the separate estate of one partner to collect an individual debt, and can not take the partnership estate until the other partner is satisfied for his debt against the partnership.

Therefore a judgment and execution against one partner, for his separate debt, does not put the other in a worse condition, for he must have all allowances made to him before the judgment creditor can have the share of the other applied to him. Mad. 76.

As between one partner and the separate creditors of the others, the separate creditors can not effect the stock any further than that partner could, whose creditors they are; and if they proceed against the partnership property, the partners may file a bill to be quieted in the possession of the partnership effects, and pray for an account of what is due to the partner so giving a security, and for an injunction in the meantime. 1 Mad. 77.

Debtor by bond to the separate estate of a deceased partner, not allowed in equity to set off his bond debt, in respect of acceptances for which he had become liable to the partnership estate, and which were proved by him under a joint commission. 2 Meriv. Ch. 115. In the case of bankruptcy, the usual directions are to apply the funds respectively; the joint to the joint debts, the separate to the separate debts, the surplus of each to the creditors remaining on the other. Ex parte Elton, 3 Ves. Jr. 238.

The same principle is admitted by the Supreme Court of the United States to govern courts of equity, but not those of law. 5 Cranch, 34; 2 Peters' Cond. 182.

The rule established in the English courts in case of bankruptcy was fully recognized by Chancellor Kent in the case of Murray v. Murray, 5 Johns. Ch. 60.

It was well established, in the time of Lord Hardwicke, that joint creditors, under a separate commission of bankruptcy, were not allowed to prove their debts for the purpose of receiving dividends with the separate creditors. But the principle was that joint creditors had a preferable claim upon the joint effects, and the separate creditors upon the separate estate, and therefore the joint creditors could not come in upon the *separate estate [112 until all the separate creditors were paid. And this was upon the plain rule of equity, that he who has two funds to resort to shall not satisfy his debt out of that one of them, to which another

creditor can resort, until he has exhausted the other fund. Per Chancellor Kent in Murray v. Murray, 5 Johns. Ch. 72.

The copartnership creditors are entitled to nothing from the estate of the deceased partner until all his separate debts are paid. Gow on Partnership, 386; see also cases referred to in note 9 to Ves. 118; 5 Serg. & Rawle, 78; 1 Des. Ch. 203; 2 McCord Ch. 302.

The doctrine of set-off might be investigated to elucidate the point in controversy; but the counsel for the defendant, Phelps, think the court will not hesitate to sanction the report, and will not permit the joint creditors to participate in the separate property of Seymour Austin until his separate debts are paid.

Judge LANE delivered the opinion of the court:

The court have heretofore decided, in this case, that a bill in chancery may be sustained, at the instance of a creditor, before judgment, to compel the distribution of the estate of a decedent, because it is a trust; and that such a bill may be filed against a deceased partner's administrator for such a purpose. An account has been taken, and the report of the master shows that there are creditors of Seymour Austin separately, and of Seymour Austin and Calvin Austin jointly; also, that the estate of Calvin Austin is insolvent.

It is now insisted, on behalf of the separate creditors of Seymour Austin, that as any property of the firm of C. & S. Austin, if found in the hands of the administrator or executor, must be first exclusively applied to the payment of the partnership debts; therefore, the separate property of Seymour Astin shall be first applied to the discharge of his separate individual debts, which, in respect to the creditors of C. & S. Austin, have a preference. In support of this proposition the following cases are cited: Gow's Part. 386; 10 Ves. 118; 5 Serg. & Rawle, 18; 2 Des. (S. C.) 203; 2 Mad. Ch. 302.

This court are of opinion that if any such rule exists it must have been of frequent application, and thus have become familiar to the profession. Yet no case is found in the books except the one in 10 Vesey and the South Carolina case. That 113] *touches such a doctrine, unless cases founded on the statutes of bankruptcy. A claim so novel, in a case necessarily of such common occurrence, must be listened to with caution amounting to jealousy. Its unavoidable tendency is to disturb and overthrow the settled policy of our law for the disposition of

decedent's assets, which seeks to make equal distribution of them to every creditor.

A creditor of two debtors, not partners, is at liberty to enforce satisfaction from either. If either die, the claim becomes a separate debt, to be satisfied on terms of equality with the decedent's other debts. But if the debtors were partners, holding a joint fund, the creditor is permitted a specific preference to subject that joint fund to the payment of his joint claim or debt; and this, not because the creditor's rights are enlarged by the existence of a joint fund, but because the interests of the partners are so connected with its distribution, that it is necessary to adopt this rule, to secure the rights of the debtors between themselves. Hence the doctrine has been introduced, that the partnership property should be first applied in satisfaction of the partnership debts; not for the creditor's sake, but because there is a fund which both parties have reciprocally a right to apply for the benefit of a third party.

But where the question is merely between the creditor and the surviving debtor, and no trust fund exists in which the other debtor or his representative have an interest, the reason does not obtain, and the creditor stands in the relation of any other creditor, to be paid in the same proportion with them. This happens to be the position of the complainants in this case, who make no claim to any such trust fund, for none such exists; but set up against the estate of Seymour Austin a joint and several debt with Calvin Austin. The question does not seem to avail in any case, except where there are two funds for distribution, and two classes of creditors.

But, even if such a case were presented, we should long hesitate before we should introduce an element into our system of jurisprudence so calculated to render more complex the equal distribution of decedents' estates among creditors. The statute plainly endeavors to make that distribution equal, conformable to the dictates of the soundest equity. We can not resist the persuasion, that the distinguished chancellors, in the cases referred to, have unwarily adopted, as a general doctrine, one rather applicable to cases under a statute of bankruptcy. We *consider that [114 its introduction here would lead to embarrassing consequences, and therefore reject it.

The case is again referred to the master.

Barbara Coonrod v. Henry Coonrod and others.

Devise to "*my son, H. C., all my estate, real and personal, subject to the following bequests;*" one of which is to B. C., one thousand dollars, to be paid to her at the age of eighteen, "*in land at such place as my son Henry can buy,*" does not create a charge on the devisor's real estate in the hands of purchasers from the devisee.

In such case the purchaser is not bound to attend to the application of the purchase money.

This cause was certified here for decision from the county of Pickaway. The facts are stated in the opinion of the court.

Olds and Green, for complainant.

H. Stanbery, for defendants.

Judge Wood delivered the opinion of the court:

The facts in this case, so far as they are necessary to be considered, are as follows: On February 15, 1814, Woollery Coonrod made his will, and soon after died. He devised all his estate, real and personal, to his son Henry; and, in the language of the will, "*subject to the following bequests;*" the first of which is in these words: "I will and bequeath unto my granddaughter, Barbara Coonrod, daughter of my son, Peter Coonrod, deceased, the sum of one thousand dollars, to be paid her at the age of eighteen years, in land, at such place as my son, Henry Coonrod, can buy for her, at its real value."

Henry was appointed sole executor, and qualified under the will. The complainant became of age in August, 1827.

The personal property was exhausted in the payment of the expenses of the last sickness and the funeral, the expenses of the executorship, and the discharge of a legacy required by the will to be paid before the legacy in question became due. Before August, 1827, the executor became insolvent. Soon afterward, the 115] complainant demanded her legacy, which was not *paid, and there is no property, personal or real, from which payment can be compelled, unless the lands devised to Henry shall be held subject to its discharge.

The lands so devised were all sold in different parcels, and at different times; some by Henry to Corn and Huston, and others by the sheriff to Stage and Huston, the other defendants. The first of these conveyances was in 1817, and the last in March, 1827, several months before the complainant became of age.

The complainant claims that the defendants, Huston, Stage, and Corn, hold the lands subject to the payment of her legacy, and prays that Henry may be compelled to disclose other property, from which she may compel the payment; and, in default thereof, the defendants, Huston, Stage, and Corn, may be decreed to contribute, *pro rata*, to its payment, and the lands ordered to be sold for the discharge thereof.

The bill contains no charge of fraud. The lands must, therefore, be supposed to have passed from Henry to the defendants *bona fide*. In the hands of Henry, no doubt exists, but what the lands would be charged with the legacy in equity. They have, however, passed from him, and whether the purchasers have a good title must depend upon the nature of the estate conveyed by the will to Henry, and whether the purchasers were bound to look to the application of the purchase money.

It is said a fee conditional only passed by the devise. *Is it so?* The will disposes of the lands to Henry, subject to the following bequests. If we close our inquiries here, we shall find but little difficulty in coming to the conclusion, that the estate, under the will, is but a *conditional fee*. It is not, however, from a single clause in this will, but from the *whole* instrument, taken together, that we are to arrive at the intentions of the testator. The words which follow the clause, "subject to the following bequests," are these: "I give and bequeath to my granddaughter, Barbara Coonrod, daughter of my son, Peter Coonrod, one thousand dollars, to be paid her when she shall arrive at the age of eighteen years, in land, where my son Henry can buy it, at its real value." Is not this language inconsistent with the construction contended for? Henry, by the requisition to pay this legacy, if he did not choose to keep it, or was unable to do so, was, from the very nature of the case, authorized to sell the land to pay the legacy. He was not limited *as to the time of the sale. He might therefore [116 have disposed of it any time after he came into possession in 1814, although he could not pay the legacy until 1827, when the complainant should become of age. The executor, then, had thirteen

years for the exercise of an *unlimited* discretion in the sale of the lands, and investment of the money, in lands, for the payment of the complainant. Can we suppose that during all this time, it was the intention of the testator to disable the plaintiff from conveying a good title to the lands, by the incumbrance of this legacy. We are rather disposed to look upon the will as conveying to Henry an estate in *fee*, and evidencing an intention to repose a special personal trust and confidence in him to discharge the duty which the will imposed. Who, then, should suffer by this *misplaced* confidence? Surely not the *bona fide* purchaser for a valuable consideration.

It may be said the two clauses of this will, the first devising the lands, subject to the payment of this legacy, and the second vesting the devisee with a general power and discretion to sell and reinvest the purchase money, are inconsistent, and can not be reconciled with each other. To this it may be answered, and in favor of the construction, that the rule is, in such case, that the *last* clause in the will is to limit or control the *former*.

Was the purchaser bound to see the application of the purchase money? This is a question which has been much discussed in the books, and the result of our inquiries has been to establish, in our minds, the conviction, that when a trust is defined, payment to the trustee is sufficient, whenever the money is not merely to be paid over to third persons, but is to apply upon trusts, which require time and discretion, as where the trust is to lay out money in the purchase of an estate. Sug. Vend. 333.

In Wormly *v.* Wormly, Wheaton, 443, Mr. Justice Story remarks, there is much reason in the doctrine, that where the trust is defined in its object, and the purchase money is to be reinvested upon trusts, which require time and discretion, as the act of *sale* and *investment* are manifestly contemplated to be at a distance from each other, the purchaser shall not be bound to look to the application of the purchase money.

In this case, the trust was defined, and the act of sale and investment were contemplated to be at a distance from each other; they required time and discretion, which were given by the 117] *will, and the purchasers were not bound to see to the application of the purchase money. This, in our opinion, is the law of the case.

HUGH EVANS, FOR THE USE OF D. S. BELL, *v.* MICHAEL INSTINE.

If the defendant in debt, upon judgment, would avail himself of the want of process or service, or of his non-appearance in the original suit, he must crave oyer of the record declared on, and set it out.

Matters of that kind can only be proven by the record.

FROM Champaign county. The plaintiff counts in debt upon two judgments, recovered in Virginia, in 1802, in a suit commenced by attachment, and makes profert of the record. The defendant, without oyer, or setting forth the record, pleads in bar, that from a period long before the commencement of the suit, he resided in Canada, out of the commonwealth of Virginia, and that the said suit, upon which the judgment was recovered, was commenced only against his goods and chattels, wherein he was never served with process, and of which he never had notice. To this plea the plaintiff demurred specially, and assigns for cause: 1. That the plea does not deny the existence of the judgments declared on. 2. That it does not deny the defendant's indebtedness. 3. That it does not allege that the defendant has any offset to the judgments or the notes on which they were rendered.

D. S. BELL, for the plaintiff, cited Coxe's Dig. 408, 411; 4 Ohio, 259–262.

J. HAMILTON, for the defendant, cited 9 Mass. 462; 15 Johns 121, 140; 1 Pet. 74; 5 Johns. 37, 41; 4 Conn. 119; 9 East, 192; 1 Dal. 261; 8 Johns. 90, 197; 13 Johns. 192.

Judge WRIGHT delivered the opinion of the court:

Counsel have argued this demurrer, as if it raised the question, how far a judgment, rendered in a sister state, without service of *process, or appearance by the defendant, was conclusive in [118 its character? But, in our opinion, that question is not before us. The two judgments upon which the plaintiff counts, he alleges remain in full force of record in Virginia.

The defense impeaches the plaintiff's right to recover, because the process was not served upon him, and because he never appeared to, or had knowledge of the suit. This matter, if true, ap-

pears on the record, which, by the profert, is offered to the defendant's inspection. It can only be brought to the view of the court, as a defense by oyer, and setting it out in the plea. All allegations, in pleading of matter of record, present an issue for the court, to be determined by inspection; but this record is not yet presented to our view. The pleader can not, as in this case, rely upon things of record, as if they were *in pais*. The rules of pleading do not permit such a course. The demurrer only admits what is well pleaded; and as this defense is not well pleaded, it receives no aid from the technical admission. Taking the plea as upon a general demurrer, a majority of us think it insufficient. This opinion renders it unnecessary to examine the cause offered for demurrer. Judgment for plaintiff.

S. ARMSTRONG AND OTHERS *v.* S. R. MILLER AND OTHERS.

Land inherited by an infant from his father, sold by guardian and converted into money under an order of court; the infant dies in his minority; his half-brothers and sisters, children of his mother by a second marriage, are his heirs.

In such case chancery has jurisdiction.

Guardian bound to employ money of an infant in his hands so as to make interest if practicable, and is chargeable with interest if he fail to do so.

THIS cause was adjourned for decision from Hamilton county. It was a bill in chancery, for an account. The complainants claimed, as heirs at law of Francis Innis, deceased, certain moneys received by the respondent, as guardian of F. Innis, upon a sale of lands made by order of court, in the lifetime of Innis, who died a minor. The case was this: F. Innis inherited lands from his father. The defendant was appointed his guardian, and applied and obtained an order of court to sell a portion of these lands for 119] the support and education of his ward. *The moneys in his hands arose from this sale. F. Innis died a minor, in the year 1818, in Indiana. The complainants, children of F. Innis' mother, by a second husband, claim as brothers and sisters of the half blood. Brothers and sisters of the father of F. Innis,

and their descendants, who are made defendants, had also set up a claim, in consequence of which, the respondent declined making payment to either, without suit or indemnity.

V. WORTHINGTON and GAZLAY, for complainants:

By the act regulating the course of descents and distribution of personal estate, in force at the death of Francis Innis (14 Ohio Stat. 36), an estate acquired by descent fell upon the blood of the ancestor from whom the estate came. Secs. 1, 12, of that act. But an estate acquired by purchase descended to the children, etc., of the intestate; and for want of children, etc., to the brothers and sisters of the whole blood, and for the want of such brothers and sisters, then to the brothers and sisters of the half blood. Secs. 2–4, 12. Then, if the estate held by Francis Innis, at his death in 1818, was acquired by purchase, he having no children, or brothers and sisters of the whole blood, it devolves or falls upon his brothers and sisters of the half blood. But if the estate came by descent, then it follows the blood of the ancestor from whom it came. The question, then, is as to the particular estate held by Innis at his death; whether it be by descent or by purchase. It seems to us there can not be much doubt or debate upon this proposition.

Innis held lands by descent. They were sold. That which is obtained for the lands is a new acquisition, not by descent, but by purchase. The lands came by descent, but the money, on their sale, by purchase.

Suppose we reverse the proposition. Say he had acquired money by descent, and with it he acquired lands. Are the lands thus acquired an acquisition by descent or purchase? The estate he has in the lands came by an act *in pais*, and not by operation of law. It represents, or is the interest he has in, the thing obtained, not by force of law upon a given state of facts, but by contract.

If lands obtained by money descended, be an acquisition by purchase and not by descent, why is not money acquired by the sale of lands descended also an acquisition by purchase? In both cases the legal conclusion must be the same. The *present [120 seems to us to be purely a question of identity. Is the money in Miller's hands, and of which his ward was the owner at his death, the very estate cast upon him by operation of law at the death of

his father, or is it an estate proceeding from a conversion of that which descended? Did this money come by descent or purchase to Innis? If it be that which descended, its identity is established, and it goes to the one set of claimants; but if it be not the identical thing that was held by descent, but something else that has been substituted, then it is not by descent, but by purchase, and goes to the other set of claimants. If one change of the subject matter be not sufficient to make the new object acquired for the old a purchase, and the estate therein an interest acquired by purchase, pray how many are?

The old rule is that property can be acquired in two ways—by operation of law and by purchase, or by descent and by purchase. Of course, that which the one concludes, the other excludes, and *vice versa*. If the conversion of the estate, held by descent in this case, into cash be not a purchase, how many changes will have to take place before the last acquisition shall be considered as a purchase?

Suppose, with the cash acquired in this case, a lot of flour had been purchased, and the flour exchanged at New Orleans for coffee, and the coffee at Cincinnati for pork, and the pork at Boston for thrice the original acquisition in cash—how are we to consider these various transfers and the estate acquired thereby in each article?

The common sense of the case would be that they were acquisitions by purchase, and that a purchase is as complete by the one single transfer as a dozen or a hundred; and if one hundred turns of the fund will constitute a purchase, one will. We therefore consider the money in Miller's hands, as the guardian of Francis Innis, as an acquisition by purchase, and not by descent, devise, or gift, and, of course, there being neither children, nor brothers and sisters of the whole blood, it belongs to the complainants, who are half-bloods. The statute operates upon the particular estate or thing as it finds it. If the thing of which the intestate dies possessed was by purchase, then it goes one way; if by descent, devise, or deed of gift, then it goes another way.

If, in this, we are correct, we are entitled to the proceeds of the sale, or the money he returned as having in his hands, with
121] *interest from June 1, 1817. That a guardian is compelled to pay interest is fully sustained by Chancellor Kent, in 1 Johns.

Ch. 508, 527, 620; 6 Johns. 452; and even compound interest, where he has used the money in trade. 4 Johns. Ch. 305.

STORER and FOX, for defendants:

We contend that the complainants are not the heirs at law of Francis Innis, jr., deceased, and therefore not entitled to the fund in dispute.

The fund in the hands of the defendant is the proceeds of a sale of real estate, made by him as guardian of Francis Innis, deceased, under an order of court in 1815. After a portion of the proceeds of sale had been expended in the education and support of F. Innis, he died in 1818.

The land sold came to Francis Innis, jr., by descent, on the death of his father in 1800. At the time of the death of Innis the elder, he left a brother and sister living, who, or their heirs, are still living. The complainants are half-blood brothers and sisters of Francis Innis, jr., by the mother's side, but are not of the blood of the ancestor from whom the estate came (F. Innis, the elder). They have no blood of the elder Innis running in their veins.

If, therefore, the real estate had never been sold by Miller, but had remained undisposed of, it would never have vested in the complainants, because they could not connect themselves by blood with the elder Innis, and because the statute gave the estate to the brothers and sisters of "the ancestor from whom the estate came." 14 Ohio L. 36.

What effect, then, had the sale of the estate, and turning of it into money, upon the rights of the complainants and the brother and sister of the elder Innis, deceased?

This question depends upon the character in which the younger Innis held the proceeds of sale. If he held the proceeds of sale as a purchaser, the statute appropriates the funds to the brothers and sisters of the half blood. If he merely held the proceeds of sale in the place of the estate by descent, then the complainants have no right to the fund. This is the only construction that can be put upon our statute, and it is the same as that of most other states. As to the proceeds of sale being a purchase, we can not consider it in that light. The statute has endeavored to preserve all the estate of the infant until he arrives at a disposing age, and it expressly provides, "that no sale *of real estate shall be [122 made, under the provisions of this act, 14 Ohio L. 159, unless the

court shall be satisfied that such sale is necessary for the support and education of such ward or wards, nor shall any sale in such case extend further than may be required for the purpose aforesaid."

The permission given to the court to order the lands of an infant to be sold, is only for the particular purposes mentioned; the character of the property can not be changed; the estate can not be diverted out of the infant only for the purpose of supporting him. But it frequently happens that it is impossible to dispose of a part of a tract of land without injury to the balance of the tract. Hence, as in this case, more land, in value, than is sufficient for the purposes of support and education, is sold. This circumstance ought not to induce the court to consider the ward to be a purchaser of the fund, which is substituted for the land, because this would be contrary to the spirit and intention of the statute referred to. The statute prevents the transaction being considered in the light of a purchase, because to turn it into a purchase is enabling guardians to do that indirectly which they could not do directly, viz: to change the succession or course of descents.

Again, can an individual be considered as a purchaser, in a legal point of view, of that over which he has no power of saying whether he will have the property, said to be purchased, or not?

We can not imagine a case in which an individual can be a purchaser without having the right to refuse the purchase. He who takes a devise, a deed, or parol agreement, is said to take by purchase, but in all these cases the devisee, grantee, etc., may refuse to accept the benefit intended. He who claims by purchase claims by "his deed or agreement." 2 Coke Lit., Thos. ed. 184, and note to 187. To constitute a title by purchase, "the act or agreement of the party is necessary." We know of no case in which a man can claim as a purchaser where he could not have refused the purchase. The deed must be accepted; the agreement must be satisfactory to both parties. A man can not be compelled to forego the pleasure of being hanged; he must accept the pardon. 7 Pet. 161.

Directly the reverse is the situation of him who claims title by descent. He claims because he can not help it; the law has cast 123] the estate upon him. He has no will of his own whether *he will have it or not. It falls upon him, and there it remains until he, by his own effort, casts the title from him.

Keeping this distinction in view, we think we can not err in coming to a conclusion. The minor could not change his title in the present case. The law took his land from him; the law, without his will or assent, forced the substitute upon him. He remained as passive in this transmutation as he was at the death of his father, when the law placed his father's title upon him. The law never compels a man to be a purchaser; so far from it, that it always, where the devisor in a will gives the same estate which without the devise, would have been cast upon the devisee, as heir by the general law, declares the devisee to be in by descent, and not by purchase. 2 Coke Lit., Thos. ed., note to 185; 5 Ohio, 464.

It does appear clear, therefore, that these complainants can not claim this fund upon the grounds above stated.

Should the court be of a different opinion on this question, we present another. Has the court of chancery any jurisdiction of this suit? As we view the case, it is a suit in chancery to recover a simple money demand. Why come into a court of chancery? If the complainants had commenced their action at law, what would have prevented a recovery? If they had been without evidence, a bill of discovery might have been filed to have obtained the necessary evidence to support the action. Unless the court lay it down as a general proposition that in all cases, and under all circumstances, the court of chancery has jurisdiction to settle testamentary and guardian matters, we see no foundation to this bill.

Should the court sustain the bill, we ask the cause to be referred to a master to take an account.

Judge LANE delivered the opinion of the court:

The statute that regulates the distribution of this estate is found in 16 Ohio L. 36. It provides that if the title to an estate shall have come to the intestate by descent, devise, or deed of gift from an ancestor it shall descend:

1. To his children.

2. To the brothers and sisters of the intestate who may be of the blood of the ancestor from whom the estate came.

3. To the ancestor, if living.

4. To the brothers and sisters of that ancestor.

*But if the estate came not by descent, devise, or deed of [124

gift from an ancestor, but was acquired by purchase by the intestate, it shall descend:

1. To the children.
2. To the brothers and sisters of the whole blood.
3. To the brothers and sisters of the half blood.

If the estate or money in controversy came by descent from the father of James to him, the complainants are not entitled to it. The decision of this question settles the main point in the case.

Had the property remained in the shape of land, as it was transmitted to the intestate from his father, it would plainly have passed, upon the intestate's death, to his uncles and aunts, or their descendants, on the part of the father, and not to his half-brothers and sisters, on the part of the mother, by a subsequent marriage. It is claimed against the complainants that the same inheritable quality attaches to the proceeds of the sale, in the hands of the guardian of the intestate, that would operate upon it if it remained land, either because it was produced by the sale of the land or was not, in fact, the acquisition of the intestate by any effort of his own.

We can not accede to the correctness of these positions. The land became transmuted to money, to personal property, by an act of law. As such, it remained in the hands of the guardian. He was debtor for the proceeds of sale, as for so much money received by him for the intestate. What the intestate inherited had been passed away, and what it produced assumed a new character. In this new character the law must regard it as an acquisition of the intestate. Consequently, it comes under the latter provision of the statute of descents, and passes to the complainants.

It is objected that chancery can not entertain jurisdiction, since the demand is merely one for money, which may be enforced at law. We consider it fully within the cases in which chancery takes jurisdiction over persons receiving funds in fiduciary relations, from whom an account may be demanded, and often is necessary. The management of this property was indisputably a trust.

The defendant, Miller, insists that, under the circumstances, he is not chargeable with interest on the money in his hands. The object for which a guardian is appointed is to keep his ward's
125] funds safely, and to render them productive. If he *fail to invest them productively, when he could do so, he is chargeable

with interest. Interest is, therefore, to be charged against him from the time he received them, unless it can be shown he could not safely invest them productively by law. The cause is remanded that an account may be taken.

C. RICHARDSON'S ADM'RS *v.* M. RICHARDSON'S ADM'RS.

The terms "*beyond sea*," in the statute of limitations of 1804, are equivalent to "*without the limits of the state.*"

DEBT, from Hamilton. The plaintiff commenced his action in November, 1831. He declares upon a sealed bill, dated January 16, 1807, payable on demand. Plea, that the cause of action did not accrue within fifteen years next before suit brought. Replication, that when the note declared on was made, the plaintiff's intestate resided out of the State of Ohio, in Pennsylvania, and continued to reside there until June 1, 1823, when he moved into Ohio, which was within fifteen years next before the commencement of the suit. To this replication the defendant demurs generally.

VAN MATRE, for the demurrant, cited 3 Ohio L. 355; 14 Ohio L. reprinted, 374; 22 Ohio L. 325; 24 Ohio L. 60; 28 Ohio L. 34; 29 Ohio L. 214; 2 Bibb, 207; 3 Bibb, 510; 2 Stark. Ev. 901, n. 2.

STRAIT and FALES, contra, cited 2 Ohio L. 60; 1 Wm. Blk. 286; 2 Dall. 217; 9 Serg. & Rawle, 288; 1 Yeates, 329; Ballantine on Lim. 179; Kirby, 299; 3 Wheat. 541.

Judge WRIGHT delivered the opinion of the court:

It is conceded by the parties in this case, that the statute of limitations of January, 1804, 1 Chase's Ohio L. 392, was in force when this action accrued. That act limits the bringing debt upon "specialty under hand and seal," to fifteen years after such cause of action; but it provides that if any person entitled to such action *shall be "beyond sea" at the time such action accrues, he [126 shall have a right to bring his action within the time limited by the act, after such disability shall be removed.

The only question presented on this demurrer is, do the words "beyond sea," in legal acceptation, describe persons without the jurisdiction of the state, though no sea intervene? The Supreme Court, many years ago on the circuit, and frequently since that time, decided that persons without the jurisdiction of the state, were "beyond sea," within the meaning of this act. The terms, "beyond sea," are borrowed from the act, 21 James I, which, in England, have been adjudged to have a meaning synonymous with *beyond* or *out of the realm*. Like expressions have been held by the Supreme Court of the United States to be equivalent to *without the limits of the state*. 3 Cranch, 174; 3 Wheat. 545; 8 Wheat. 366. Similar decisions have been made in other states. 1 Har. & McH. 89; 1 Har. & Johns. 350; 2 McCord, 331; 3 Mass. 271; 1 Pick. 263. With these constructions we are satisfied. The plaintiff, then, being within the exception of the statute, and the *disability* continuing until he removed into this state in 1823, less than nine years of the statute had run when the suit was brought, and the replication avoids the plea.

Leave was asked and obtained to amend the plea, on paying all the costs since they were filed.

State of Ohio v. David Collins.

State can sustain an action on promise in writing to commissioners of the canal fund.

Where the stipulation is to pay money or land, "on condition the canal passes through Chillicothe," the money within three years, or the land six months after location, final location of the canal fixes the rights of the parties.

Not necessary to prove the organization of a board of canal commissioners in a suit connected with the official action of that board.

Not necessary to prove the construction of the canal, where defendant has made a contract dependent on that event.

Written agreement to pay money, "on condition that the canal passes through the town of Chillicothe," is not affected by proof that defendant understood it should pass on a particular line, without allegation of fraud in obtaining the agreement.

This was a motion for a new trial, reserved for decision from the county of Ross.

*The suit was *assumpsit* upon the following writing: "We, [127 the subscribers, agree to pay or convey to the commissioners of the canal fund, for the use of the canal fund, the sums of money or real estate attached to our respective names, on condition that the canal passes through the town of Chillicothe. The sums of money subscribed, are to be paid at the convenience of the purchasers, at any time within three years from this date; the conveyances of real estate are to be made within six months after the line of the canal, passing through the town is put under contract. Chillicothe, December 1, 1825.

(Signed,) "David Collins, two hundred dollars in land at cash value, or cash."

The case was tried by a jury; a verdict was found for plaintiffs. The following reasons are assigned to support this motion for a new trial:

1. That the subscription paper does not show any contract; or if any, it is variant from the declaration.

2. The evidence does not show the contingency happened by which the money fell due.

3. No evidence was offered to show the existence of any board of canal commissioners.

4. No proof of notice to defendant of the completion of the canal.

5. The rejection of the defendant's testimony.

JAMES WORTHINGTON, in support of the motion for a new trial:

1. The defendant insists that this supposed contract is void, because one of the parties named therein (the fund commissioners) had no power, either from the express terms of the statute, or from the nature of their duties, to make such a contract. The state, whose agent they assumed to be, would not have been bound by any stipulations made by them, either individually or as a board, in relation to the subject matter of the contract. They had no power, as agents of the state, to perform the condition on which depended the obligation of the defendant to pay them money or convey land, viz: the passing the canal through Chillicothe; nor was it their duty to solicit or receive subscriptions on behalf of the state; but, on the contrary, all these powers and duties were, by express statutory provision, conferred upon an entirely different board, the board of canal *commissioners. [128

See 5 Ohio, 62, 63; 23 Ohio Stat. 57.

If, therefore, this paper be a contract, it is a contract with the individual commissioners of the canal fund alone, for it would be most unjust and unequal for a principal to claim the benefit of a contract made by an agent, whose power to act for him in the subject matter he disavows, and by whose acts in relation thereto he could not himself be bound. Again, this is not the contract declared on by the plaintiff. The declaration charges the defendant with having undertaken, etc., to pay to the State of Ohio, etc.

Such, indeed, is the contract which section 10 of the statute above referred to, 23 Ohio Stat. 57, directs the canal commissioners to enter into with the proprietors of lands near or through which the canal may, or may be proposed to pass; but the terms of the paper offered in evidence, and purporting to be a contract with "the commissioners of the canal fund, for the use of the canal fund," as above recited, are totally variant both from the plaintiff's declaration and the statutory direction.

If the defendant is to be held to the written terms of his obligation, it is but fair that for both parties the writing should be its own interpreter. The fund commissioners are the only obligees named in the subscription paper, and, therefore, with them alone must the contract be presumed to be made. And even if the fund commissioners were duly authorized to make such a contract on behalf of the state, as the subscription purports to be a promise to pay "to the commissioners of the canal fund, for the use of the canal fund," belonging to the state, we submit, with great deference and without argument, the following authorities, to show that the action ought to have been brought in the names of the persons with whom the contract was made, and not by the *cestui que use* 1 Chit. Pl. 3, 4; 1 Liv. 235; 13 Johns. 88.

2. Even if it be admitted that the board of fund commissioners, which was in existence at the date of the subscription paper, was duly authorized to solicit and receive subscriptions, payable to themselves, for the use of the canal fund, there was no evidence offered by the plaintiff to prove that they (the fund commissioners), or any other authorized agents of this state, were the individuals with whom the contract was made. Why was this? Was it from the fear that too much might be proved, that the contract
129] was made with persons not authorized to act *on behalf of

the state? This court can not infer that a contract, such as is authorized by law, was made with the agents of the State of Ohio, from a paper which nowhere contains a reference to the State of Ohio; nor can they infer that those agents were duly authorized to act in the premises.

3. The contract is avoided, even if originally valid, by the neglect or omission of the plaintiff to perform within the stipulated time the precedent condition. In order to simplify the argument on this point, I will suppose that the defendant left himself no option, but subscribed, as did most of the subscribers to the same paper, "on condition the canal passes through the town of Chillicothe, to pay, etc., within three years from the date of the subscription paper." By the testimony of Mr. Price, (engineer), adduced by the plaintiff's counsel, it appeared that the canal did not pass through the town of Chillicothe until 1832, or more than six years thereafter, although a considerable portion was excavated two years before. Time is an essential ingredient in every contract. Could the plaintiff recover the amount of the subscription *before* the canal "passed through" Chillicothe? I think it will not be contended that he could so recover.

Can the amount, then, be recovered, after more than double the time has elapsed, by a party who thus tardily performs the stipulation which he claims to be the sole consideration of the contract? The inducement and consideration of the subscription might be an interest for a term of years, in a property which it was expected by the tenant would be benefited by the performance of the condition, or many other cases occur, in which the consideration would be entirely destroyed by the neglect or delay, for so long a time, of the other party to perform the precedent condition. It is therefore submitted, whether the fair construction of the paper be not that the stipulation as to time is mutual between the parties, and the contract can not be enforced by the party who delays performance for more than twice the time thus fixed.

It is obvious that in this respect the option of the defendant to pay in land or money, can not alter the mutual obligations of the parties; but,

4. As the defendant, by his subscription, reserved the right to pay in land or money, it would seem but fair that he should be notified of the completion of the canal through Chillicothe, and that a demand should be made of him to make his election *as to [130

the mode of payment, before a right of action could accrue. 1 Ld. Raym. 279; Doug. 14.

Any other course would deprive him of his reserved right of option, and transfer that option to the other party.

No evidence, however, was adduced by the plaintiff that the defendant was so notified, or that such a demand was made of him; and from the showing of the plaintiff's witness (Mr. Price), the action was in fact commenced before the completion of the canal, or passage of the water through Chillicothe.

The above grounds of defense are partly technical, and it would not have been necessary to urge them to this court, had the defendant been allowed to prove, as he offered to prove:

5. What was the principal consideration of the subscription, and that this consideration was a mistaken consideration, an error of both parties, but an error arising from the misrepresentations of the agents of the party now claiming the benefit of this contract, and also that the remaining consideration of the subscription was taken away by the act of the agents of the state, who changed the line of the canal from the route contemplated by both parties at the time of the subscription, after a considerable portion had been actually excavated, in reference, not to considerations of public advantage, but for the benefit of the individuals interested in the change of location, and who paid a consideration therefor. A brief outline of the evidence thus offered by the defendant to explain this document, signed, not with the caution and deliberation of ordinary business transactions, but hastily, and under erroneous impressions, produced by the statements of the agents of the plaintiff in this suit, will close this argument on the part of the defendant.

Testimony was offered by defendant, and rejected as inadmissible by the court, to prove, that shortly before the date of the subscription paper, two routes of canal had been run and staked by the state engineers from Circleville to the mouth of the Scioto, one on the east, and the other on the west side of the river—the latter passing through the town of Chillicothe, and through a valuable outlot belonging to the defendant; and that these were the only two routes contemplated by the defendant at the time of his subscription. That from the reports of the engineers, it was believed at that time by the canal commissioners, and by them stated to the defendant and other subscribers to the paper offered in evidence

131] by plaintiff, at a *public meeting, that the route on the east

side of the river was the most eligible and least expensive, and consequently the canal would be there located, unless the citizens of Chillicothe should by subscription raise a sum sufficient to indemnify the state for the additional risk and expense of location on the west side. That under this impression, and in order to make up this deficiency, the defendant, together with other citizens of Chillicothe and vicinity, owning property along the route on the west side as then located, entered into a contract to pay the canal fund commissioners, as expressed in the paper upon which this action is brought.

That shortly after the date of the subscription paper, from more accurate estimates and examinations of the two routes, the western or Chillicothe route was found to be preferable "as to relative cost and advantage," and was so reported by the canal commissioners to the legislature; and, therefore, that the principal consideration of the defendant being to make up a deficiency, which did not exist, was a mistaken consideration, founded upon error as to the subject matter of contract, and the contract was consequently void. 1 Pothier on Obligations, 12.

That the defendant being at that time unacquainted with the location of canals, supposed, in common with other subscribers to the paper, that the route was permanently fixed by the engineers, and if located on the west side of the river, it would certainly pass along the line already located through his property, and the amount of his subscription was predicated on the expected enhancement by the canal of the value of his property. A large portion of this line was not only put under contract, but actually excavated, within the limits of the town; when, at the instance of other citizens of Chillicothe, the line of canal passing through the town was changed so as not to touch or come near his property, leaving it much less valuable than if the route contemplated by him had been persevered in.

Under these circumstances, we contend, for the defendant, that he ought to have been permitted to show a failure of consideration, and a change of the route of the canal after subscription made and excavation commenced, by private contract with other individuals. The reply was, that there is no ambiguity on the face of the contract, and that parol evidence could not be admitted to vary or alter its legal effect. A line of canal had been located through Chillicothe when the subscription was made. The parol

132] evidence offered was to point the *application of that term to that line, as being the line contemplated by both parties. Both lines pass through Chillicothe. The legal effect of the contract is not altered, unless the consideration has failed. If the passage of the canal through the lands of A., lying in Chillicothe, is the consideration of *his* subscription, on the ground of individual benefit, his subscription is a *bonus* for that benefit. If the canal is removed to the land of B., also lying in Chillicothe, for a *bonus* which B. pays, may not A. show that the consideration for *his bonus* has failed. If the canal is made through the lands of A. and B., on the grounds of public justice and policy, while A. and B. are induced by the agents of the state to subscribe for the purpose of bringing the canal to the route most advantageous to them, it is evident that the location of the canal is independent of and uninfluenced by any promise or bonus. The advantage is derived from the act of the government, on grounds independent of private interests, and the *bonus* ought not to be demanded. The line located through the property of the defendant, and contemplated by him at the time of his subscription, was put under contract and excavations commenced. This was shown by plaintiff.

By private contract, the canal commissioners changed the route entirely from this line to one which did not come near the property of the defendant—to a line which was considered by the commissioners themselves as less safe, more expensive, and interfering more with private rights. The difference of risk and expense was made up to the state by private citizens and to subserve private interests. The authority in 18 Johns. 397, is in point. If the canal commissioners, then, without strong motives of state policy, abandoned a line under contract and partly excavated, for the advantage of other individuals, the state not being benefited, we think the defendant might insist on this matter of defense, and show the understanding of the subscriber at the time of subscription—that but one line or route was contemplated by him, and that the change in the route was made contrary to his consent, and swept away the consideration upon which his subscription was made. Starkie on Evidence, 1000–1026; Chitty on Contracts, 24, 25; Phillips on Evidence, 513, 566.

LEONARD and SWAN, for plaintiff:

The first objection taken to the verdict, namely, that the com-

missioners had no power to enter into such a contract, and that the same is void, was argued *and determined in the case of [133 the Commissioners of the Canal Fund *v.* Perry, 5 Ohio, 56. According to the decision of that case, this contract was made with the state. "This contract was entered into entirely on the part of the government, by a person authorized to make it, and its obligation is on the government only." Id. 65. In the same case it was held, that the canal fund commissioners were neither a corporation, nor had they power to solicit donations. The commissioners of the canal fund have, in their public capacity, had no participation in this contract. They have merely lent a private hand in transmitting the instrument from the promisor to the promisee. Nor can it be material to its validity in what manner or by whom it was transmitted. If voluntarily entered into on the part of the defendant, and the plaintiff has performed its condition, this is such evidence of the assent of both parties that neither can deny its obligation.

This court, in the case above referred to, determined that this identical contract was founded upon a sufficient consideration to bind the parties. If one without authority makes a contract on behalf of another, and the contract is ratified, either expressly or tacitly, by the performance of its stipulations, it becomes binding upon all. If authorities should be wanted to this plain principle, they may be seen. 13 Mass. 178, op. 182; 1 Caine, 526. While the contract remained executory, *perhaps* the defendant, and certainly the plaintiff, might set up the want of authority in the agent to enter into it; but after it has been executed by the principal, which is undoubtedly the highest evidence of assent to its terms, it is too late to question its obligation. We flatter ourselves we have answered the points reserved in the first and third specifications.

2. The second exception to the verdict appears to be a mistake, in fact, which will be seen by the terms of the instrument upon which the suit is predicated. The instrument does not prescribe the time when the canal shall pass through Chillicothe. No time being specified, the law would imply that it should pass in a reasonable time. There was no complaint that the canal, in its passage through Chillicothe, was unreasonably or unnecessarily delayed. By recurring to the instrument it will be discovered that

no time was stipulated for the completion of the canal, either in express terms or by reasonable implication.

4. Two distinct objections are taken: 1 That the defendant had 134] no notice of the completion of the canal. 2. That no *demand was made before the commencement of the action. The first of these objections, we are quite sure, was not made on the trial. We are, however, willing to meet both.

It was in proof that the defendant's residence was near Chillicothe, within the hearing of the *feu de joie* at its completion. It is matter of public history that all the public journals in the Union noticed from time to time the progress of this mighty work. Its completion was almost simultaneously announced in all quarters of the United States. The patriotic citizens of Chillicothe celebrated the event with civic and military processions, and one of her distinguished men pronounced an oration on the occasion.

From all these circumstances, as well as the very nature of the undertaking, it would be absurd not to infer the defendant's knowledge of this notorious event. But the law does not require notice. It was neither necessary to make such averment nor prove it. 5 Com. Dig. Pleader, 369, ch. 75,; 1 Day, 183; 2 Ohio, 204. The averment, however, was made in the declaration, and this court must be satisfied that the defendant had notice, and that the jury had a right so to infer from the circumstances. 2. The nature of the defendant's undertaking did not require a demand befo e the commencement of the suit. The defendant undertook to pay two hundred dollars in land, at cash value, or cash. The effect of the contract is, that they may have the privilege of discharging it by a deed of conveyance of land, of the value of two hundred dollars, at any time within six months after the canal should be put under contract; but if he did not elect to pay in land, at the time specified, he would pay in cash, at his convenience, within three years from date. It is urged there was no officer of state who had authority to receive a deed, and consequently the defendant was excused from tendering one. This is a mistake. The commissioners are expressly empowered "to take, in the name of the state, such grants and conveyances as may be proper and competent to vest in the state a good title to the same." Canal Doc. 52; Law of January 27, 1823. The same provision is contained in the act of February 4, 1825, section 10. No difference in principle is perceived between a contract to pay a sum of money in

land or specific articles. If a person contracts to deliver specific articles he will be discharged if he is ready to deliver them. 4 Mass. 474. A note was given to pay forty pounds in land, and this note was admitted under the money counts. 2 Johns. 125. *On a contract to pay ten pounds five shillings in good [235 trade by the 15th of October, no proof of a demand is necessary. 1 Bibb, 263, 328. This case is almost exactly like that of Morris v. Edwards, 1 Ohio, 189, in which this court held that no act was necessary to be done by the plaintiff; but if the defendant elected to pay, as he had the privilege of doing, "in bank notes, current in Cincinnati," he should have made the tender; failing to do so, the note became absolute for the specified sum of money.

The duty in this case lay upon the defendant to deliver, or offer to deliver, a deed for the land, if he elected that mode of discharging his contract, not upon the plaintiff to demand his choice.

It is not admitted, as suggested by the defendant's counsel, that this action was commenced "before the canal had passed through Chillicothe." If this were the case, it would be fatal to the action. The proof, however, was, that the canal was completed through that place early in the spring; as early as the month of May, 1832. The summons bears date, June 28, 1832.

No objection was made on the trial, that the suit was commenced before the plaintiff had a right of action, and none could be made, for the evidence on that point, being uncontradicted, was conclusive.

5. The last objection is, that evidence was offered, in bar of the action, that some individuals of the board of commissioners, for the purpose of obtaining subscriptions, had held out inducements to the citizens of Chillicothe, which had not been realized, and which were founded in mistake; and further, that the canal line was changed subsequent to the date of the instrument, and does not *now* pass through the land of the defendant, as he supposed it would. The defendant insists, that evidence of this character was improperly rejected, because it would show a failure of consideration, and consequently, that this action could not be maintained.

It would be impossible for this court to ascertain the advantages which have resulted and must result to the citizens of Chillicothe, from the completion of this splendid undertaking; and perhaps those, of all in the state, have the least cause to murmur at the policy or the result. But for the steady adherence of the com-

missioners to that just and liberal policy which led to the protection of fixed property in every instance where it could be done, 136] without very great sacrifice *on the part of the state, the canal would have passed on the eastern side of the Scioto, and that now flourishing town would have been, at this moment, a mass of deserted ruins.

The effect of the testimony, if admitted, would have been, to vary, by parol, a written contract, in which there is no pretense to claim there is anything like ambiguity. This can not be done. 6 Mass. 430; 3 Stark. Ev. 1002; 1 Ohio, 178.

The defendant also appears to suppose, that the consideration which would give validity to this instrument must be a direct and certain benefit to himself. By resorting to such grounds, the defendant is doing not only great injustice to his own disinterestedness and patriotic liberality, but entirely misapprehends the binding operation of an instrument of this kind. The consideration for the promise is not that the canal should pass through the land of the defendant, or that his property should be enhanced in value by its completion, but that "the canal should pass through the town of Chillicothe." The contract, for its consideration, has in contemplation a public benefit; and this is a sufficient one, to give validity, in that respect, to the contract. 20 Johns. 89; 5 Ohio, 56, and the authorities there cited.

If the defendant really intended to make his donation depend upon other conditions than that specified in the contract, it was competent for him to do so, and the plaintiff would have been bound to their performance, before the right of action would have accrued. Such is not the case. The contract, in very clear and explicit terms, requires the canal to pass through Chillicothe; and the defendant has undertaken to pay upon the performance of that single condition. The condition has been performed to the letter by the plaintiff, and the defendant must perform his part.

It would be strange, indeed, to make the binding obligation of a contract depend upon the question, whether either party has realized his expectations under it, and to pronounce the disappointment of either, in this respect, a failure of consideration. This is, in substance, what the defendant claims should annul the contract, and be a legal bar to the action!

The application of the case of Griffin v. House, 18 Johns. 397, to the point under consideration, is not distinctly perceived. It is

indeed, intimated by the court, that a discretionary power once executed, is at an end. It is not necessary to examine the correctness of this doctrine. The second section *of the act of [137 February 4, 1825, vests the power in the commissioners of making a canal; and vests the power in them to make it at discretion, except three special points, to wit: Lake Erie, Licking Summit, and the mouth of the Scioto. It is very clear, the power vested was not executed until the canal was finally completed between those points. The power of changing lines, at intermediate points, was necessarily incidental to the general power. But the defendant is certainly not intrusted with the supervision of the agents of the state. If they have transcended their authority, it has not been in violation of *his* contract. Whether the agents of the state have acted indiscreetly and faithlessly, or not, the state has performed *her* contract with the defendant. She has taken the canal through Chillicothe. It seems, then, notwithstanding the indiscretion and want of fidelity, and violations of law, on the part of the government agents, the state has, by good fortune, been enabled to fulfill, to the very letter, its engagements with the defendant.

WILLEY, in reply, upon the first, third, and fifth causes for a new trial:

The case of the Canal Fund Commissioners *v.* Perry is cited by the plaintiff's counsel as conclusive against the defendant upon the first and third points made. That case, rightly understood, involved, necessarily, altogether a different question than those here to be decided. The points here involved did not necessarily arise in that case; they were not discussed in that case, or thought of by counsel on either side, for the reason that the suit was between different parties. The court, in delivering their opinion, however, advanced sentiments indicative of the construction which ought to be given to contracts of the nature declared upon in this case. That case, correctly apprehended, seems to establish the doctrine that contracts of this kind *may* be binding on the promisor, and *when binding* the state must sue in its own name; and that case seems to go no farther. Now, whether binding and obligatory or not, depends upon the structure and language of the contract. If the state is made, by the contract, a party to it, as the payee or obligor, and a consideration passes, or is to pass to the promisor,

the state may sue. If, however, the state is not a party, expressed to be such, that authority upon the first and third points in the case proves nothing.

In the present case, how does it appear that the State of Ohio 138] *was interested in the contract, or a party to it? The state is not named in it. There was no proof on the trial that the state was a party or had an interest. Express written contracts exclude all implied ones upon the same subject matter. There was no promise shown as made to the state. That the state might have a collateral interest in its fulfillment makes no difference. The declaration avers that the defendant "undertook and promised the State of Ohio to pay," etc. Is this true? The contract does not say so, and all parol proof, the counsel for the plaintiff contend, must be excluded.

With whom was this supposed contract made? Evidently with the fund commissioners. It is immaterial in this case to inquire whether they had power to make it on their own account or not. It is only necessary to ascertain whether they could make it on behalf of the state, as the agent of the state, and did they so make it? None of the statutes defining the powers and duties of the fund commissioners give them the power. The case of the Fund Commissioners *v.* Perry expressly declares that "that contract is neither within the express powers conferred upon the fund commissioners nor within the general scope of their authority." There was no contracting party, then, on the part of the state, and none is pretended or inserted in the contract itself on the part of the state. The fund commissioners were not agents in this matter. The state had never made them such. It is not pretended in the contract. In the supposed contract they did not presume to act as agents. They took the promise, whether good or not, to themselves. How comes the state, then, seeking the benefit of a promise which it had never authorized, but refused to have taken in its behalf, and which, in fact, never was made or taken in its behalf at all?

The plaintiff's counsel have some difficulty in this respect. The counsel for the plaintiff say: "The fund commissioners have had, in their public capacity, no participation in this contract." In what capacity have they participated in it? In their individual capacity, it is presumed. The defendant is content with this position, and maintains it fully. Inasmuch as the fund commission-

ers had no power as public agents, in a public capacity, to make such a contract, and inasmuch as they have not pretended to make such a contract, as public agents, on behalf of the state, or make use of the name of the state in any respect, it is clear that it should be regarded as an individual transaction only.

*The counsel for the plaintiff do not appear to apprehend [139 the question presented. They say, "if voluntarily entered into on the part of the defendant, and the plaintiff has performed its condition, neither can deny its obligation." The question on this point is not what its obligation is, or whether it has any; but the question is, to whom or in whose favor the obligation was attempted to be incurred when the contract was made. The state can not, by any act it can perform, change or transfer a promise or liability, or supposed promise or liability, to itself. If the state has performed the condition, or an individual has performed the condition, it makes no difference. The state gains nothing by that in aid of maintaining a suit in its own name, unless a party to the contract at the time of its formation.

Again, the counsel say, "if one without authority makes a contract on behalf of another, and the contract is ratified either expressly or tacitly by the performance of its stipulations, it becomes binding upon all," and authorities are cited. The application of this principle of law, to this case, is not discovered. It has no application. The question before the court is not understood. The principle is advanced upon the supposition that that is conceded which is not conceded, but the very point in controversy. The plaintiff's counsel have got to maintain, and consequently ought to have laid down, the following position: "If one without authority makes a contract on behalf of himself, which he can not enforce, can a third person, not named in the contract, step in and fulfill its conditions, and enforce it in his own name by suit?" The fund commissioners did not, for, legally, they could not make the contract for and on behalf of another, the state. They had not the power, and there was no *stipulation* for the state to perform, for *no* one had undertaken that the state should perform any, and consequently none existed. Upon the doctrine of the plaintiff's counsel, if Ohio had stopped the canal at Circleville, and a wealthy individual, or the State of Virginia, had extended it through Chillicothe to the Ohio river, such individual, or the State of Virginia, could maintain this action to recover the amount of

the subscription. And why? The stipulation, that is, the making of the canal, is fulfilled; the defendant has got what he subscribed to get. The contract was not framed to meet such an exigency. And yet it is difficult to draw the distinction, inasmuch as this court has said, in the case referred to, of the Fund Commission-
140] ers *v.* *Perry, that "the power of making such a contract can not be taken, by implication, as conferred upon the fund commissioners," and inasmuch as the plaintiff's counsel themselves disavow any participation on the part of the fund commissioners, in making the contract, as public agents of the State of Ohio.

Contracts must be mutual and reciprocal in their obligation. Transpose the parties. Suppose the defendant, within the six months, had conveyed the land to the value of two hundred dollars to the fund commissioners, in the very terms of the stipulation and contract, and suppose the canal had passed on the east side of the river, and not through Chillicothe, would the defendant have had any remedy as against the state? The true language would then be applied to the defendant, that the state had nothing to do with any unauthorized dealings or stipulations of the fund commissioners.

But, at all events, it is submitted that there is a variance between the contract declared on and the one offered in evidence. Contracts must be declared on according to their legal effect, or in the words in which they are framed. The declaration sets forth a promise to the State of Ohio. This is claimed to be the legal operation of the promise in the contract to the fund commissioners. Can this be so? It can not, if the views already taken are correct, that the fund commissioners had no right or power to act for the state. But suppose they had; then the legal effect of the promise must be carried throughout the whole description of the contract, and the legal effect is, that the land is to be conveyed or money paid to the state, and not to the fund commissioners. In the case of Perry, already referred to, the court say, "that the act expressly requires donations to be received in behalf of the state, or to the state, that the effect of the promise was the same as to pay the state, and the expression in the contract, designating the fund commissioners, did not seem to be used to describe the obligee of the contracts," etc., "but barely the agent to receive the money." A promise to the principal to pay the agent, or a promise to the plaintiff to pay another man when the principal or plaintiff is

suing for his own money, and when the legal effect of the promise, if it has any, is to pay the principal or plaintiff, is a new mode of interpretation. The contract reads, "we agree to pay or convey to the commissioners of the canal fund." The declaration sets forth a promise to the state, and, by the statute and decisions, the payments must be described as following *such promise, by [141 legal intendment. If, as the plaintiff's counsel claim, the contract was made with the state, a performance of it was stipulated to be made to the state, and must be so set forth, and the breach must correspond with such allegation. Would a deed of the land to the fund commissioners, not being a corporate body, or capable of receiving title, discharge the defendant, upon the grounds assumed in this case by the plaintiff, that the promise and the whole contract was made with the state, and that the fund commissioners had no participation or hand in it, "except a private and neighborly hand to transmit the contract to the state."

If, however, the counsel for the defendant have mistaken the law upon the points discussed under the first, second, third, and fourth reasons assigned why the court should grant a new trial, they feel assured that under the fifth cause assigned the ground they have assumed is tenable, and that a new trial will be granted by the court.

The counsel for the plaintiff have not answered the argument upon this point.

They set out by saying that, "It would be impossible for the court to ascertain the advantages which have resulted and must result to the citizens of Chillicothe (the defendant, ha?) from the completion of this splendid work"!! What can be said upon such a flourish as this? It is impossible for the court to know the advantages or disadvantages without hearing the evidence. At least we are bound to presume, in courts of justice, that neither the court nor the jury can ascertain satisfactorily the merits of a cause without hearing the testimony. There may have been one or two exceptions to impugn the universal prevalence of this presumption, within a few years past, in the administration of justice, but these exceptions still leave the old order of things unshaken as a rule of action and as a rule of law. That which is easily shown in court in respect to a supposed contract with a single individual, ought not to be called "*impossible.*" The offer was to prove that the contracting parties (the agents of the state, if the

counsel please, on the one side, and the defendant on the other), were mistaken in respect to the subject matter, and the supposed existence of facts appertaining thereto, at the time of making the subscription—that the state gave nothing, and that the defendant received nothing and could receive nothing by the fulfillment of the contract or condition.

142] *Judge LANE delivered the opinion of the court:

The point intended to be presented by the first objection is, whether the state can sustain an action, in its name, upon that paper. We regard the affirmative settled in the suit of the Commissioners of the Canal Fund v. Perry, 5 Ohio, 55, and here have only to repeat our adherence to that opinion.

The second objection leads to a construction of the agreement as to the time of performance. The terms of the contract are not expressed with much precision, yet its meaning is not obscure. The defendant stipulates to pay two hundred dollars in three years, or land to that value in six months after the canal passing through the town be put under contract, on condition that it shall pass through the town. By the phrase "passing through the town" is meant, not the completion, but the final location and establishment of the line of canal. It is not a part of the contract that the canal shall be undertaken in three years, but all the conditions must happen before the defendant's performance can be claimed. If the defendant intend to convey the land, he must do it in six months after the line of canal be established or put under contract through the town. If he do not convey the land, the money is due after three years, and the establishment and contracting for the line through the town. The evidence showed the jury these facts occurred in the spring of 1824.

The third objection, that no proof was offered of the existence of any canal commissioners, is answered by the general law organizing and creating them.

The fourth objection, that the defendant had no notice of the construction of the canal, was not taken at the trial. If it had been taken, the jury would have been instructed that they might presume, from his residence and from his property in Chillicothe, that he could not have been ignorant of an event so deeply affecting his and every man's interests—so identified with our re-

cent history, and occupying so large a space in the volumes of our legislation.

The defendant offered to prove the consideration had failed, by establishing the following facts: 1. That prior to the subscription, experimental lines had been run down both sides of the Scioto river, the western of which passed through the town of Chillicothe, and was estimated by the engineers to be the most expensive. That the commissioners represented to the defendant and to the other citizens of Chillicothe that the *eastern [143 line would be selected for the work, unless they subscribed sufficient to meet the increased expense; that under this belief, and for this purpose, this subscription was made; but it was afterward discovered that the eastern line was not the cheapest, so that the commissioners and the subscribers were mistaken in the facts. 2. That the defendant was the owner of an out-lot of the town through which the experimental line was run, and that he was led to subscribe by the belief that the canal would be constructed on this line, and would enhance the value of this lot; that by a subsequent arrangement between the commissioners and certain citizens of Chillicothe, the route of the canal was so changed as to pass through the town in another direction, without touching the lot of the defendant, which is not so valuable as it would have been had the experimental line been selected for the route.

It will be recollected that this case presents no fraud, for all imputation of fraud was explicitly disclaimed by the defendant's counsel. The mistake, if any such existed, was one common to both parties, if the canal commissioners can, in any sense, be deemed parties to the agreement. But if both parties act under a common mistake, it does not avoid the agreement; the act done is valid between them, and binds both; for work done under such a mistake, the operative is entitled to his price.

The defendant, in entering into this contract, might impose his own terms; but when defined and reduced to writing, the writing must be taken to embrace them all. The conditions shown by the writing must be complied with, and those not specified, in the absence of fraud or mistake, are deemed to have no existence. But the defendant seeks to multiply those conditions, and to make his liability depend on the greater cheapness of the eastern route and the projection of the canal through the town in a particular

line. These are no elements of the agreement, and they could not be shown by parol, if they were so. 1 Johns. Ch. 273, 339.

What are the terms of this contract? Men are led into agreements by many causes, such as the hope of profit, the expectation of acquiring what they could not otherwise obtain, the desire of avoiding a loss. Yet these *inducements* are not the *consideration*, and compose no part of the contract. The *legal consideration* from the other party, the consequences which follow the contract, its benefits or its disappointments, are matters beyond the convention, with which he has nothing to do. The whole present en-
144] gagement was to pay to the agents of the *state two hundred dollars, on condition that the state shall construct the canal through the town. If the benefits he expected do not arise, he is not permitted to cast his disappointment on the state.

The last clause of this evidence is exposed to the further objection that, taken in its largest effect, it shows a partial failure only. The lot is not so much enhanced in value as it would have been had the canal ran through it; but it can not with truth be asserted that it derives no additional value from the location of the canal through the town; so that, if the enhancement of the value of the lot were the consideration, its failure is not total, and constitutes no defense at law. 3 Ohio, 285.

Motion for a new trial overruled. Judgment on the verdict.

JAMES TAYLOR *v.* JOHN ALEXANDER, DAVID PETERSON, AND JAMES BOLAND.

When the officers of justice stand justified in law for their acts, it is incompetent to inquire into the motive which induced them to act.

In trespass against a constable and one of his *posse*, irregular process from a court having jurisdiction of the person and the subject is a justification, notwithstanding the preliminary steps to the process are irregular.

Leave to enter a nonsuit will not be received after verdict.

TRESPASS, from Wayne county. The declaration contains three counts. The first two for an assault, battery, and false imprisonment of the plaintiff, and the third for an assault, battery, and false imprisonment of the plaintiff's wife. The defendants pleaded,

severally: 1. Not guilty; and, 2. Gave notice of justification, as to the first two counts, under a state's warrant issued against the plaintiff on October 27, 1832, by the defendant, Alexander, a justice of the peace, on the complaint, upon oath, of the defendant, Peterson, for feloniously taking a parcel of buckwheat, delivered to the defendant, Boland, for execution; by virtue of which he arrested and brought the plaintiff before said justice. 3. To third count, a like notice of justification, under a search-warrant against the plaintiff, issued by justice Alexander, and given to constable Boland for execution; and while he and the defendant, Peterson, as his *servant, and by his command, were in the [145 execution thereof, because the plaintiff's wife attempted to obstruct them, and to prevent her from doing them injury, they gently laid hold of her, but did her no unnecessary injury.

At the trial, the plaintiff having proved his arrest and imprisonment by Boland, that the arrest was advised by him and Peterson, and that Boland seized and held Mrs. Taylor on account of indications on her part to scald him, offered to prove that the defendants knew he was innocent, and procured the arrest to bring him within reach of civil process, which, being objected to, was rejected by the court. He then rested his case, and the counsel for defendants moved for the discharge of Alexander, because there was no evidence against him. This motion was objected to by the plaintiff, and overruled by the court; but the court permitted the jury to retire upon the case as to Alexander, when they returned a verdict of not guilty.

In the further progress of the cause as to the other defendants, the following papers were offered in evidence by the defendants:

1. The affidavit of Peterson, made October 26, 1832, before Alexander, "that on or about the 16th of this instant, in the county of Wayne and state aforesaid, David Peterson doth on oath declare, that he verily believes that said goods and chattels, or some part thereof, is in the house of James Taylor; or does verily believe he is guilty of the fact charged."

2. The warrant of the justice against Taylor, reciting a complaint of Peterson, on oath, "that Taylor, on or about the 16th inst., it is believed, did take a certain quantity of buckwheat from the barn of Thomas Scott, the property of Peterson," which was returned with the body.

3. The search-warrant from justice Alexander, reciting that it

had been made to appear to him "that the following goods and chattels, that is to say, about twenty-five bushels of buckwheat, more or less, within twenty days last past, by James Taylor or wife, feloniously taken, stolen, and carried away, etc., and that the said D. Peterson doth on oath declare, that he verily believes the said goods and chattels, or some part thereof, according to the belief of the deponent, are concealed in the house of the said James Taylor;" therefore commanding him, with the necessary and proper assistance, to enter into the house of Taylor in the daytime and search for said goods, and if any were found, to bring them 146] and the said Taylor forthwith *before the justice; which was returned with part of "the stolen property," but the body not found. This evidence was objected to by the plaintiff's counsel, but admitted by the court.

In submitting the cause to the jury, the court instructed them that these proceedings under the criminal laws, though irregular, were not void; and being, for the purposes of the action, valid, they afforded a justification to the defendants acting under them, proceeding in a reasonable manner, and using no more violence than was necessary to execute them; and also, that in *this form of action*, if the process was legal, the motive of the party in procuring it, or in setting the machinery of the law in motion, need not be regarded. The jury found for the defendant; and a new trial is moved for, because the court erred in rejecting evidence offered by the plaintiff; in admitting that offered by the defendant, and in misdirecting the jury as to the law.

L. Cox, for plaintiff, cited Wheat. Selw. 115, 118; 4 Blk. Com. 291; 1 Chit. Pl. 169; 3 Stark. Ev. 1450, note *z*, and 1453; 5 Taunt. 442.

Dean, contra, cited 3 Stark. Ev. 1446, 1448, note *c*; 2 Stark. Ev. 818.

Judge Wright delivered the opinion of the court:

The first question to be decided is, whether it is competent for the plaintiff in trespass to prove, in order to enhance the damages, that a *legal prosecution* was commenced with a malicious motive? If the prosecution complained of be malicious, and the forms of law have been used for malignant purposes, the party injured has

his remedy by an action on the case for a malicious prosecution, in which the concurrence of a malicious motive with the want of probable cause, will subject the aggressor to damages commensurate with the injury sustained, and oftentimes to those exemplary or vindictive. In trespass, the rule is different. If the defendant in that action has acted under valid legal proceedings, they will justify him, and protect those acting under him. The true question in such a case is, were the acts complained of legal? If they were, they are none the less so, because the party instituting the legal proceeding was actuated by motives of revenge or malignity. The evidence offered by the plaintiff, and ruled out at the trial of this case, was offered upon the *avowed ground that pro- [147 ceedings had been commenced under the criminal laws. The proceedings themselves *had not been shown*, and could not be considered by the court either as legal, or as illegal and void; and it was therefore properly rejected. It is no answer to this to say, that subsequently these proceedings were given in evidence, because after so given in evidence the proof was not offered.

2. Were the warrants of the justice of the peace a justification to the officer and his *posse*? The principle is well established that executive officers, being obliged to execute process, are protected in the rightful discharge of their duty, provided the process issued from a court or magistrate having jurisdiction of the subject matter. And if the magistrate proceed unlawfully in issuing the process, he, and not the executive officer, will be liable for the injury. 13 Mass. 286, 272; 14 Mass. 459. The executive officer is justified, even when the process under which he acts is voidable for irregularity or mistake in issuing it. 4 Mass. 232; 2 Stark. Ev. 818; 3 Stark. Ev. 1448, n. *e*. The cases relied upon by the plaintiff's counsel are those of attempted justification where there appears an *excess of jurisdiction*. In such cases, the process being *void*, it, of course, could afford no protection. As if a justice of the peace were to issue a writ in slander that process would not protect the officer, because the justice has no jurisdiction of the subject. It does not comport with law or correct policy to permit an executive officer, or those he commands as his *posse*, to examine into the regularity of the proceedings of the court whose process they execute, or to confer upon them authority to proceed or to forbear, as they may judge best. The rule that holds them to know the extent of jurisdiction requires for its justification

some legal subtlety, but rests on far different ground from that urged by the plaintiff. The papers in this case are irregular, but do they not show a proceeding under the laws of the state? We think they do. The affidavit might not stand a critical examination. The magistrate in drawing it has endeavored to pursue the statute form, and has omitted a sentence. If the affidavit was the authority under which Peterson and Boland justified, we should doubt; and we might also doubt, if the justice sought under that to protect himself. But it must be remembered that the justice was acquitted before this evidence was introduced. We think the other defendants need not look back of the warrants for their 148] justification. The larceny is bunglingly enough *charged in the warrant, yet it shows that there was a complaint under the laws for the punishment of crimes, for taking the property of another and commanded the arrest, and the officer was legally bound to execute it. The search-warrant describes the offense sufficiently clear. The objection that it sets forth the belief that the offense had been committed by Taylor *or his wife*, while it commands the search of the house of Taylor, the husband, and if the goods were found, to bring forth only his body, does not seem to us of much weight. The goods were found in *his* possession; *his* arrest is complained of; and, in our opinion, the law does not invoke the aid of courts to punish the officers of justice for trifling errors in drawing up legal process. If they are substantially good, they are sufficient. We do not inquire what rights these parties have in any other form of action, and only decide that, in this case, the error of the court is not apparent; certainly not such as to require of us to grant a new trial.

The court is asked, in case the motion for a new trial is overruled, to permit the plaintiff to enter a nonsuit on paying the costs. This we decline to do. It would innovate upon the usual practice to allow a nonsuit after verdict; and we have decided, at this term, in the case of Gazzam *v.* Cincinnati Insurance Co., *ante*, 75, that our office here is to decide questions reserved in the county. This motion was not made in the county and reserved; as an original one, it can not be received.

Judgment on the verdict.

In the Matter of the last Will and Testament of Anthony Chapman, deceased.

Appeal does not lie to the Supreme Court from a decision of the court of common pleas, adjudging that the proof adduced to prove the execution of a will is insufficient for that purpose.

This case came before the court by reservation in the county of Knox. The devisee, under a writing claimed to be the last will and testament of Anthony Chapman, deceased, presented it in the court of common pleas for probate. The proofs were heard, and being adjudged insufficient, an order *was made re- [149 fusing probate of the will. From this decision, the devisee appealed to the Supreme Court, and executed a bond to the heirs at law, the contestors of the establishment of the will. The question presented for decision was, does an appeal lie in such a case?

H. Curtis, H. B. Curtis, Delano and Brown, for the devisee.

Goddard and Converse, for the heirs.

Judge Lane delivered the opinion of the court:

The practice of removing causes by appeal, for a second trial, is created by statutory provision. Where an opportunity for a full trial has been had, an appeal for a second one ought not to be allowed, unless it is required by the plain tenor and terms of the law, giving such appeal. 3 Ohio, 277. Section 22 of the statute relating to wills gives an appeal "*from the decision of the court of common pleas, when any will, or other matter relating thereto, shall have been contested.*" In this same statute, provision is made for contesting, by bill in chancery, the validity of a will when once admitted to probate. In admitting a will to probate, the court pronounce a final decision. But this is to be avoided by a process different from an appeal. An application to prove a will, though rejected, may be made again, upon fuller proof. The rejection extinguishes no right, and binds nobody, for there are no proper parties before the court to be concluded. But when a will is declared established, and ordered to be recorded, it binds everybody until set aside. It must then be contested in the

form of a litigated suit, if contested at all. The parties interested must be brought before the court, and consequently must be bound by its judgment. In that case, the appeal is as proper and necessary as in any other. Not so when the probate is refused. The court, therefore, are of opinion that this appeal can not be sustained; it does not come within the provisions of the statute.

Such has been the uniform practice throughout the state, as far as can be now ascertained, by recollection and inquiry. We have no instance in which such an appeal has been taken and acted upon. The practice on a point like this is regarded as full evidence of the law.

150] *The State of Ohio, for the use of the Executors of Wm. Spencer, v. Amos H. Caffee.

In suits on official bonds by party injured, it is sufficient to name the person for whose use the suit is brought, in the process and declaration.

In suits upon official bonds, under the statute of Ohio, the plaintiff must set forth the condition of the bond, and assign breaches in the declaration.

In assigning a breach on the bond of a clerk of the court, it is requisite to be particular enough to apprise the defendant of the breach of duties complained of.

A clerk of the court is not bound to issue process without a written precipe is filed according to the statute.

Debt from Licking. The suit is brought upon the official bond of the defendant, as clerk of the court of common pleas. The declaration contains three counts:

1. Upon the penalty of the bond alone.

2. The second sets out the condition of the bond (which is, in substance, that the clerk shall well, faithfully, and truly enter and record the orders, decrees, judgments, and proceedings of the court, and faithfully and impartially perform all the duties of his office), and assigned the following breaches:

1. A general non-performance, negativing the condition of the bond.

2. That the testator, on December 3, 1823, recovered a judgment, in the court of common pleas, against one McDougal, from which

McDougal gave notice, upon record, of his intention to appeal to the Supreme Court, and afterward, on January 5, 1824, with one Taylor, executed and delivered to the defendant, as clerk, a certain paper writing, containing only the names, date, and seals of the obligors, which the defendant, as clerk, afterward filled up as an appeal bond, without the consent or direction of the obligees, and accepted and approved of the same, as a valid appeal bond, in that case, certified that the appeal had been perfected, and thereupon refused, upon request, to issue execution upon said judgment; that the intestate prosecuted his cause in the Supreme Court, to judgment, which still remains unsatisfied, by *means whereof* the testator lost the benefit of his judgment, the payment whereof might have been coerced, at the time he applied for execution, but that McDougal has since become wholly insolvent; and *by means whereof, also*, the testator lost the benefit of security for the judgment to be recovered in the Supreme Court, which he would have had, if the bond had been legally executed, and regularly taken by the clerk.

*3. The third count sets out the condition of the bond, and [151 assigns for breach that on January 5, 1824, after the recovery of the judgment, the testator, at the office of the defendant, directed and requested him, as clerk, to make out and issue upon said judgment process of execution for the collection of the judgment, which, in violation of his duty as clerk, he neglected and refused to issue, *by means of which neglect and refusal* the said judgment is wholly lost.

To the first count in the declaration the defendant craved oyer of the bond and condition, and having set them out, demurred specially: 1. Because the interest of Spencer, for whose use the suit is brought, is not disclosed; and 2. Because no breaches are assigned. To the other counts there are several pleas and cross-demurrers, which it is unnecessary to specify, as they result in presenting to the consideration of the court the sufficiency of the declaration.

GODDARD and CONVERSE, for the defendant, cited 1 Saund. Pl. & Ev. 133; Com. Dig., Pleader, 14; 29 Ohio L. 78, 58, 214; 1 Chit. Pl. 427; 1 Term, 246; 2 Mass. 521, 522; 5 Mass. 270.

H. STANBERY, contra, cited 29 Ohio L. 187, 214, 241, 267; 3 Ohio,

487; 2 Ohio, 25; 11 Johns. 6; 6 Cranch, 127; 5 Johns. 168; 8 Johns. 111; 7 Johns. 376; 2 Hen. & Munf. 446; 4 Ohio, 175; 10 East, 359; 1 Chit. Pl. 270, 288, 423, 424, 461, 462.

Judge WRIGHT delivered the opinion of the court:

The first question for us to examine arises upon the sufficiency of the first count of the plaintiff's declaration. It is objected to the count that the interest of Spencer, for whose use the suit is brought, is not disclosed. The act pointing out the manner in which suits may be prosecuted, on the bonds of executors, administrators, and *officers* (29 Ohio L. 267), makes any person injured by the misconduct of an officer competent to obtain a certified copy of the bond, and to institute and carry on *in the name of the obligee, for the use of the person suing, an action of debt*, and to recover judgment for the amount of the bond, and to have execution for what may be sufficient to indemnify him. The act does not prescribe any method of setting forth the nature of the interest of the person so suing, except in the progress of the cause; 152] but, on the contrary, it authorizes any *person injured to sue in the name of the state *for his use.* The general practice, we believe, has been so to sue obligations not assignable, and in cases where the right to sue arises by special provision or operation of law. In Numlin et al. *v.* Westlake, 2 Ohio, 25, this subject is considered, and the court say: "It is the common practice in the courts of this state to designate in this way the person for whose benefit a suit is brought, when it is necessary to commence it in the name of the original obligee or payee, and it has been considered a sufficient authority from the nominal plaintiff to justify the officer in paying the proceeds of the judgment to the person designated." We are satisfied with the practice, though the other objection to this count of the declaration may render it unnecessary to decide this point.

It is further objected to this count that there are no breaches assigned. The argument in favor of this objection concedes it to be the usual practice on private bonds to declare upon the penalty without setting out the condition and assigning breaches. We think the practice in England, and in most of the states, upon bonds of this character, is the same. It is generally admitted in both countries that it would be a more convenient practice, in all cases, to set out the condition, and assign breaches in the declara-

tion. Counsel claim that the act pointing out the manner of prosecuting suits of official bonds, 29 Ohio L. 267, requires the breaches to be assigned in the declaration. Section 2 of that act makes it lawful, after judgment, for any person injured to proceed by *sci. fa.* on the judgment until the whole amount is exhausted, and provides, "that the plaintiff *shall always set forth the breach or breaches* on which he may intend to rely, to support his suit." It is urged for the defendant, and we think with force, that to sanction the mode of pleading adopted in this case, would give to the plaintiff an unfair advantage, inasmuch as it would operate to prevent the defendant from availing himself of the provisions of the law allowing the defendants to plead "as many several matters as he shall think necessary for his defense." 29 Ohio L. 67. Under the constructions which have obtained to this statute, if the breaches are not assigned in the declaration, the defendant would, in general, be limited to one matter of defense, because the courts hold that the authority to *plead* several matters is not an authority to rejoin several matters. This statute is beneficial to defendants, and there exists strong reason why public officers should not be *deprived of its benefits. The plaintiff's [153 counsel insist, however, that the provision of the act subjecting the *cestui que use* to costs, in the event of a judgment for the defendant, secures him against the evils resulting from this deprivation. We do not concur in this. The evil is the cutting him off from the opportunity of making his defense to the action. It would, in our opinion, afford him little consolation to tell him, after judgment against him, that if his defense had been let in, and he had recovered judgment, he might have recovered costs against the person who had caused the suit to be brought against him, instead of the obligee of the bond. It is further urged that this mode of declaring on bonds of this description received the sanction of this court in the case of Ohio, for Fulton, *v.* Colerick et al., on a sheriff's bond. 3 Ohio, 487. A reference to the authority shows, indeed, that the declaration in that case was upon the "obligatory part of the bond," but no objection was raised upon that account, nor is the point alluded to in the argument of the counsel, or the opinion of the court. The point, therefore, in this state, is an open one. The statute fairly admits of the construction which requires of the plaintiff to set out the condition of the bond, and assign his

breaches in the declaration. That construction is of admitted convenience in practice, and conducive to the ends of justice. We know of no rule of practice, or principle of law, that will be violated in its adoption. If the meaning of the legislature were more doubtful than we consider it, the clause of the act referred to, allowing costs against the *cestui que use*, shows the term plaintiff to be used in the act in its ordinary legal sense. This count, therefore, is bad, and the demurrer to it must be sustained.

The first breach assigned in the second count, is demurred to, because it is too general, merely negativing the words of the condition of the bond. The rule is, that the breach must be assigned with such certainty, as to show the subject matter of complaint, and it would be bad to assign for breach, that the defendant had not performed his agreement, unless the contract were such that such assignment must apprise him of the complaint. Com. Dig., Pleader, 48; 7 Price, 550. Apply this rule to the breach under consideration. The undertaking is, that the defendant, a public officer, shall perform all the duties of his office—the breach, that he has not performed all the duties of his office. What cause of complaint does this apprise the defendant of, 154] that he may be prepared to meet it? *Is he required to procure evidence, and stand ready to defend all his official acts for years? If it be said he is only to look to those official acts connected with the *cestui que use*, the answer is, the clerk's acts are numerous, his duties various; the plaintiff himself may have had many transactions in the office; and though *he must* know what he complains of, the clerk can not know without the particular matter is pointed out. We think it very clear that this general assignment, though negativing the words of the condition, in this class of cases, is not sufficient, because it does not reach the end of all pleading, the giving notice of the action relied upon. The second point made on the demurrer to this bond has been already considered in the demurrer to the first count.

The second breach, in substance, is, that Spencer recovered a judgment in the common pleas, and the defendant, as clerk, took an insufficient bond for an appeal of the cause, certified the appeal, and afterward refused to issue an execution, according to the plaintiff's direction and request, whereby he lost the judgment, by the insolvency of the defendant, between the appeal and the judgment recovered in the Supreme Court. The gravamen of

this breach is the alleged refusal of the clerk to issue execution when directed and requested. It is a well settled rule, that pleadings are to be construed most strongly against the party pleading. Section 10 of the practice act of 1824, 22 Ohio L. 54, provides, "that any person requiring a writ shall file a precipe with the clerk, who shall make out and deliver such writ or process as is directed." No clerk is bound to issue process, without a precipe in writing filed as his authority and indemnity. If it be supposed, then, though we do not decide that point, that the clerk took an illegal bond, the breach shows that Spencer, in whose favor it was taken, knew it, and required an execution on that ground. But was this requisition a legal one? One that the clerk was bound to obey? We think not. The breach shows, that Spencer so thought himself, for instead of moving to quash the appeal, because of the illegality of the bond, he prosecuted the suit, as if properly appealed, and thus ratified the act of the clerk, in taking the bond and refusing the execution; for if the cause was appealed no execution could be issued. So that, if the execution had been legally required by precipe, it does not seem clear to us that the clerk could be made liable for taking an inoperative appeal bond. *But we intend to leave that question unde- [155 cided for the present, as we are of opinion the other objection is fatal to this breach.

The third count, like the second, sets out the condition of the bond, the recovery of the judgment, and that Spencer, at the office of the defendant, directed and requested him, as clerk, to make out an execution upon the judgment, which, in violation of his duty, he neglected to do, whereby the debt was lost.

This count is obnoxious to the objection we have examined, as to the second breach of the second count. It does not show that the direction or request for execution was such as the law requires, or such as imposed upon the clerk an obligation to act; no precipe was filed for the writ. And although it alleged that the refusal was contrary to the defendant's duty as clerk, yet, where the act claimed to be in violation of duty is set forth, the court will look at it, to see if it appears to be such in law, the plaintiff being supposed to disclose his true case in its strongest aspect; and if, on examination, the act does not appear to be in violation of the duties of the officer, the legal presumption is in his favor, and will avail him. If a party would subject an officer,

he must take care that his own steps are conformable to law. This count is also insufficient.

The six several demurrers of the plaintiff to the pleas of the defendant, therefore, are overruled. This is done without examining the sufficiency of the pleas, upon the familiar maxim that a bad plea is good enough for a bad declaration.

Leave was given to the plaintiff to amend, on paying the costs.

156] *WILLIAM H. DOUGLASS v. ANDREW HUSTON AND OTHERS.

Liens upon land are given by statute, and can not be extended in equity.

Judgment creditor acquires no lien, in equity, upon the choses in action of his debtor, until a bill is filed to charge them. The elder equity is always preferred.

It is not sufficient evidence of fraud to vitiate a contract, that a great bargain was obtained in the purchase of a litigated property from an embarrassed debtor.

THIS cause was adjourned, for decision here, from the county of Pickaway. It was a bill in chancery, filed under the statute of Ohio, by the complainant, as a creditor, seeking to subject certain alleged equitable interests of his debtor to the payment of the debt. The material facts were these:

The complainant, owned by assignment, two judgments, rendered in favor of the Farmers and Mechanics' Bank of Chillicothe, against John Carlisle and others, in 1821. In 1824, he caused these judgments to be levied upon two hundred acres of land in Pickaway county, as the property of J. Carlisle, and became himself the purchaser, at sheriff's sale, for eight hundred dollars, which amount was returned as money made on the execution.

Carlisle's title to the land, thus levied upon and sold, was also derived from a sheriff's sale. It had been levied upon and sold, in May, 1815, as the property of Ulrick Coonrod, at the suit of J. J. Wills, for the use of J. Carlisle, against U. Coonrod, and J. Carlisle became the purchaser, for seven hundred and forty-nine dollars and sixty-five cents, which was returned upon the execution as

money made. After the levy of this execution, but before the sale, U. Coonrod, the defendant, died, and devised the land to H. Coonrod. U. Coonrod only held the land by title bond, the fee being in a third person. But Carlisle obtained the possession, and to that the complainant, Douglass, succeeded upon his purchase. The estate of U. Coonrod has been wholly squandered by his devisee, who is insolvent.

In this state of the case, the defendant, Huston, with a full knowledge of all the facts, purchased of H. Coonrod, the devisee, his interest in the lands for the consideration of fifty dollars. After this purchase, he filed a bill against the person who held the fee, and obtained the legal title by a decree. He also purchased and obtained assignment of Carlisle's judgment against U. Coonrod. He then brought an ejectment against the complainant, Douglass, in possession under his purchase on the execution against Carlisle, and recovered the possession.

*The bill was brought by the complainant, to charge the [157 land, as in equity, the property of Carlisle at the time of the levy and purchase, under which complainant claimed. The answers admitted the facts substantially as stated. Carlisle denied all fraud of act or intention, and Huston insisted upon the fairness and legality of his purchase, under the circumstances in which it was made.

DOAN and G. SWAN, for complainant

We believe, from the whole circumstances of this case, the plaintiff is entitled to relief. It is admitted than no interest passed by the sale and sheriff's deed to John Carlisle, who purchased on an execution. Wills, for Carlisle, *v.* Ulrick Coonrod. At the time of the judgment and sale the legal estate was in Joseph Hoffman; the equity alone was in the judgment debtor. This equity, which was not affected by the sale, was devised by the elder Coonrod to his son, Henry. The devisee, with a full knowledge of the judgment against his father, and the purchase by Carlisle, executed a conveyance to the defendant, Huston, for the consideration of fifty dollars. Carlisle, in insolvent circumstances, assigned, for the nominal consideration specified in the deposition of R. Douglass, Esq., the judgment in Wills' name. Douglass had notice of all the circumstances, for he was the counsel of Carlisle. Huston, for the sum of two hundred dollars, be-

came the assignee of Douglass, with that kind of notice which rendered his conduct, if not more reprehensible, vastly less entitled to a favorable consideration from this court. The defendant, Huston, then stands precisely in the situation, with regard to the complainant, that Carlisle and U. Coonrod did before any assignment by the former or the death of the latter. The inquiry is, then, what decree would this court have pronounced had the complainant filed a bill against Carlisle before he assigned his judgment, and living Ulrick Coonrod? The levy of the execution and the sale under it, as well as the indorsement, "money made," would have been set aside as proceedings founded in mistake and misapprehension. It would have been iniquitous, indeed, for U. Coonrod to have held the land and insisted upon the discharge of the judgment against him. It would have been unjust, on the part of Carlisle not to have surrendered his interest in this judgment to his *bona fide* creditor. It can not be doubted but the court would have rectified the mistakes and placed the parties in *statu* 158] *quo*. It would be strange, indeed, to *afford protection to one, in the situation of Coonrod, who saw the levy of the sheriff upon that which was no more effectual than a levy upon the winds, and saw his equitable creditor purchase under an evident mistake perfectly known to his debtor, and who would ask the court to give validity to the sheriff's return in his favor! Coonrod, in this way, would have discharged the debt without any consideration whatever. Carlisle was a judgment debtor; and as such, in the absence of property tangible by an execution at law, was liable to have his choses in action and his equitable interests subjected to the discharge of his debts. Coonrod, as the debtor of Carlisle, was bound in equity to pay over the amount to the complainant. Before the statute, choses in action and things not subject to execution could be reached in chancery by creditors. Bayard *v.* Hoffman, 4 Johns. Ch. 450. Since the statute, no doubt can possibly exist. 29 Ohio L. 84, sec. 16.

The price paid, by Huston to Henry Coonrod, for the conveyance, was so entirely inadequate, that it bears the unquestionable impress of fraud upon its face. Fifty dollars paid for a tract of land which sold at sheriff's sale, in 1824, for nearly eight hundred dollars! Upon this point it would be trifling to cite authorities. The situation of Carlisle, known and well known to Huston, made it fraudulent to purchase from his assignee, who was not in a much

more favorable situation than himself, for a consideration totally inadequate, being nearly six times less than the judgment and interest. Thus, Mr. Huston has obtained a judgment which, in equity, is entirely unsatisfied, for something like twelve hundred dollars, and valuable real estate, worth probably two thousand dollars when he recovered the conveyance, for the very inconsiderable sum of two hundred and fifty dollars, in part upon deferred payments; and this speculation, so far as it is such, at the expense and loss of the creditors of Carlisle and U. Coonrod. It would be most unconscionable to suffer Huston to enjoy the fruits of such a transaction. Let it be remembered, too, that his official station led him to the knowledge of the fact of which he took advantage. The policy of the law requires that he should not be treated with tenderness or compassion. 1 Johns. Ch. 406.

The complainant relies upon relief as against Huston, who claims as assignee of Douglass, upon the following authorities: 2 Johns. 441, 479; 2 Wash. 233, 255. The assignee of a chose in action takes it subject to the equity of the original holder. 2 Munf. 533.

*H. Stanbery, for Huston: [159

The complainant's counsel admit that the judgment against U. Coonrod was not a lien on his equitable interest in this tract of land, and that no title, legal or equitable, passed to Carlisle, as purchaser, and that his relation to U. Coonrod was merely that of a judgment creditor, without any lien or priority. It follows necessarily, from these admissions, that the complainant, by his purchase of the same tract of land, under his judgment against Carlisle, acquired no title; that his relation to Carlisle is that of a judgment creditor, without lien, so far as this land is concerned; and his relation to U. Coonrod is that of a judgment creditor of Coonrod's judgment creditor.

Without, for the present, bringing forward the title of Huston, we claim that here is no case for relief. The aspect which is given to the case, in the argument for complainant, is that of a judgment creditor seeking to reach, by the aid of equity, property of the judgment debtor, not tangible at law. The kind of property to be reached is an equitable interest in land, once owned by the judgment debtor of the complainant's judgment debtor, which equity passed from the original judgment debtor at his death, either to his devisee or to his heirs at law; and the means of reaching it is

by a sale under that original judgment, now dormant by the want of execution within five years, and abated by the death of the defendant.

It is unnecessary to inquire what favor such a case would meet with under any known head of equity jurisdiction, for the reason that we have an express statutory provision upon this subject matter. It will suffice to remark, that it is at this day *questio vexata* in the English chancery, whether equity will in any case assist a creditor to reach a fund intangible at law, upon which he has *no lien*. Chancellor Kent, in Bayard *v.* Hoffman, 4 Johns. Ch. 459, does give the relief in behalf of assignees of all the debtor's estate, real and personal, for the benefit of *all the creditors*, which he carefully distinguishes from the case of *a single creditor*.

We are relieved from this uncertainty by the provisions of section 16 of the chancery act, vol. xxix, 84, which specially designates the cases for such relief, and the mode by which it is to be administered. The complainant attempts to bring his case within that clause of the section which enables a judgment creditor to reach a *judgment* in favor of his debtor. As he admits this judg-
160] ment had no lien, and that no *title, legal or equitable, passed to Carlisle by the sale, the consequence is, that the only "interest" to be reached is the *judgment*. The statute provides for a sale or transfer of the particular *interest* which is in the creditor's debtor. Supposing, however, that by the equity of this section, where *the interest* of the debtor is a judgment without lien, that the creditor may not only reach the judgment itself, so as to have a sale and transfer of that, but may, by this statutory proceeding, subject to its operation an equitable interest not bound by the judgment, and have a sale of such interest, we object that such relief can not be had in this case because:

1. By the death of U. Coonrod, this equitable interest either passed to his devisee, or descended to his heirs, subject to the payment of his debts generally, and not to appropriation by any individual creditor, and can only be reached in a course of administration. Bustard *v.* Dabney, 4 Ohio, 68; Miami Exporting Company *v.* Turpin, 3 Ohio, 514.

2. The right of the complainant to proceed against this equitable interest depends, among other things, upon the fact that the judgment against Ulrick Coonrod is yet unsatisfied. That judgment is dormant and abated, and being primarily a charge *in per-*

sonam, it can only be set up and revived in a litigation to which the *personal representatives* of Ulrick Coonrod shall be parties.

3. The judgments in favor of the complainant against Carlisle and others are also essential to the complainant's case. The bill shows no execution or proceeding upon those judgments since the year 1824. More than five years having elapsed, they are dormant. A court of chancery is not the proper jurisdiction for the revival of judgments, and will not entertain a case in which no reason is seen why this preliminary step was not taken at law.

But if the court should hold that these objections are not well taken, we then claim that the complainant makes no case for relief, as against the defendant, Huston.

It is admitted by the complainant, that Huston acquired the equitable title to the two hundred acres by purchase of Henry Coonrod, the devisee; that he got in the legal title by decree against Hoffman, and that he has an assignment of the judgment of Carlisle against Coonrod.

The case made by the complainant's bill is to reach and sell this equitable title by a sale under this judgment. If, then, *either [161 the judgment or the equity is beyond his reach, the case fails:

1. As to the judgment. This was first assigned by Carlisle to R. Douglass, and by R. Douglass to Huston. Both these assignments must be invalidated before the complainant can reach the judgment. The ground on which they are attacked is that of actual fraud.

As to the assignment from Carlisle to Douglass, the answer of Carlisle and the testimony of Douglass concur in a denial of fraud, or of any intent to injure the complainant, or to postpone his rights. The only circumstance relied upon to show the fraud is the inadequacy of the consideration. This was not of money, which has a known value, but of professional services, which were not particularly estimated by the parties, further than to satisfy themselves that they constituted a fair equivalent for the assignment.

Before a court will declare a transaction fraudulent on account of inadequacy, there must be a definite knowledge of the value of that consideration in reference to the value of the thing for which it was given, that, by contrast, the inequality may be so evident as at once to shock the moral sense. Knobb *v.* Lindsay, 5 Ohio, 472.

Here no foundation is laid for such estimate. We can form, at best, but an imperfect idea of the value of the judgment or the professional services, and when put in contrast, they present no such glaring and evident inequality.

Then as to the assignment from Douglass to Huston. This is claimed to be set aside on the ground that Huston, with a knowledge of the complainant's rights, purchased the judgment of Douglass, with the intent to defraud the complainant, at an inadequate consideration.

The intent to defraud is denied, and not proved.

The consideration is stated by both parties to have been fair and satisfactory; and as they were dealing in reference to their own rights, without even involving the rights of *their* creditors, it is difficult to apprehend how the inadequacy of price can be regarded as a fraud on the complainant, who has never stood in the relation of a creditor to either.

Then there being no fraud, actual or constructive, in this assignment, is it invalid because of any notice which Huston may have had of the complainant's rights?

162] What were these rights? Simply those of a creditor *without title and without lien. There was nothing to which *notice* could attach, so as to affect the conscience of the purchaser; for the knowledge of the indebtedness of the vendor is of no avail if it is unaccompanied with the *intent to defraud.*

2. As to the equitable interest. The purchase of this is also attempted to be set aside on account of fraud. Here, too, there is a denial by both parties of any fraudulent intent, and a reliance upon the inadequacy of the consideration as evidence of fraud *per se.* The answers show that the bargain was made by parties with opposite interests, and that the value of the equity was carefully weighed against the price paid for it.

But again, this equitable interest no longer exists. The decree against Hoffman invested Huston with *the legal title,* and this equity of which he was then possessed, *eo instanti,* merging in the larger estate. Admitting that under peculiar circumstances, a court of chancery after such merger will open the title to set up the equity, yet this is not such a case as to authorize it.

Indeed, the case made by the bill would not allow such decree. It goes for a sale of the equitable interest, by decree against

Huston, and of a transfer of the legal title, by decree against Hoffman.

The title of Huston, then, has a four-fold defense: the assignment of Carlisle, the assignment of R. Douglass, the conveyance of the equitable title, and the decree, operating a conveyance of the legal estate; all which must be broken down before the complainant can effect his purpose.

OLDS, on the same side.

Judge LANE delivered the opinion of the court:

If the complainant come into equity to set up a specific lien to the two hundred acres of land, in virtue of his purchase, under the judgment against Carlisle and others, such claim is evidently groundless. The existence, validity, and extent of a judgment lien, are matters purely legal, dependent upon statutory provisions. If it fail at law, it can not be aided in equity. 3 Ohio, 517.

In 1824, at the time of his purchase, the complainant occupied the position of a judgment creditor of Carlisle. The levy, sale, and return of money made, on the execution, produced *nothing [163 because Carlisle had no interest in the property sold, consequently the purchaser could obtain no interest. But this could not affect the case.

If complainant's judgment against Carlisle still subsisted unsatisfied in fact, and open upon the record for the whole amount, the case shows only that Carlisle held a judgment in the same condition against U. Coonrod. The amount of this judgment would be a debt due Carlise from Coonrod, which might, in a proper case, be applied in equity to the satisfaction of the complainant's judgment. It would be the ordinary case of a creditor pursuing the choses in action of his debtor, in equity, where no means of satisfaction could be found at law. This would be according to the common practice in equity, 4 Johns. Ch. 687, and to our own statutory provisions. The application of this principle disposes of the rights of all the parties to this case except those of Huston. Hoffman holds the legal title, as trustee for him who may establish his right to it. H. Coonrod holds what interest he has in the land liable to satisfy any just claim against U. Coonrod's estate. Carlisle would be compelled to give up his interest to satisfy the complainant's judgments against him. Consequently, as between the par-

ties, the complainant should be aided to enforce Carlisle's rights against the estate of Coonrod.

But Huston claims by purchase. He procured from H. Coonrod a transfer of his interest, March 22, 1827. He has obtained the legal title by a decree against Hoffman, and he holds the interest of Carlisle in the judgment against U. Coonrod, under an assignment by Carlisle to Richard Douglass, June 1, 1827, and by R. Douglass to him, December 30, 1828. If these assignments are valid, they must prevail against the complainant. They are elder than the attaching of his equity, which commenced with filing his bill in 1831. It is well settled that, in such cases as this, the earliest equity must be preferred.

It is insisted that the purchases, by Huston, of his interest in the land from H. Coonrod, and of the judgments from R. Douglass, are both fraudulent. Admit it were so, the complainant's case would not be aided, unless it is also made out that the purchase of the judgment from Carlisle, by R. Douglass, in 1827, was fraudulent. If that purchase was *bona fide*, it presents an insurmountable bar to the complainant's recovery. It transferred all Carlisle's 164] interest to R. Douglass, so that nothing remained *in Carlisle to be secured when the bill was filed. The assignment to Douglass must be shown to have been fraudulent and void before the rights of his assignee can be affected.

There is no evidence, among the proofs of the case, conducing to the conclusion that the purchase of R. Douglass from Carlisle, in 1827, is tinctured with fraud. The right of Carlisle to use the judgment for any beneficial purpose was very obscure, at the best, and certainly involved in litigation. His pecuniary affairs were hopelessly decayed, so that it could be of little moment to him which of his creditors possessed himself of this remnant of doubtful property. It is reasonable to suppose that R. Douglass, in such circumstances, made the purchase with an eye to his own profit, and without reference to Carlisle's creditors, or design of defrauding them. We can not justly ascribe to him any other motive than that of making a good bargain out of an harassed debtor. We can impute no other design without proof, and against the express denial of all fraud in Carlisle's answer. In this view of the case, Carlisle had no interest in the subject when the bill was filed; it must, therefore, be dismissed.

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J. Abram's Lessee v. G. Will.

To recover in ejection upon prior possession alone, that possession must have been actual and notorious.

The court may, in a proper case, in giving it to the jury, comment upon the evidence admitted.

Ejectment from Ross. On the trial in the county, the plaintiff, in support of his title, offered a final certificate of purchase, issued for the land claimed by the United States land office, to his lessor's ancestor, upon which no patent had in fact been issued. He offered no other direct evidence of title, but proved that the ancestor had laid out a town upon the quarter section and recorded the plat of it under our law, and that he had paid the taxes of the tract. The defendant disclosed no title. The court instructed the jury that the certificate of purchase only furnished evidence of an equity in the lessor of the *plaintiff, but not of a legal right [165 to possession avoidable in ejectment. The judge commented upon and explained to the jury the evidence as to the laying out and recording the town plat, as bearing upon the question of possession in the ancestor of the plaintiff's lessor, and concluded by instructing them, "that to enable the plaintiff to recover upon the prior possession of his ancestor alone, that possession must have been actual, notorious, and open." The jury found for the defendant.

T. Scott, for the plaintiff, now moves for a new trial, because the court erred:

1. In instructing the jury that the final certificate of purchase from the United States land office, did not confer upon the holder a legal estate upon which he could recover in ejectment.

2. In not instructing the jury that the laying out a town upon the land, and paying the taxes, was sufficient evidence of the possession of the ancestor upon which to recover.

3. Because the court commented upon the facts to the jury.

Creighton and Bond, and G. Swan, contra, cited 3 Wheat. 412; 2 Wash. C. C. 33; 1 Marsh. 440; 2 Bibb, 417; 4 Bibb, 554; 2 Ohio, 263; Til. Ad. on Ej. 32, note 1, 247, 489; Littell's Sel. Cases,

513; 1 Ohio, 313; 1 Caine, note, 190; 3 Johns. 388; 2 Stark. Ev. 515; 2 Har. & Johns. 380; 3 Ohio, 263.

WRIGHT, J., announced that as to the second and third points relied on for a new trial, the court were unanimously of opinion that no error in the court was shown. Whether the laying out the town, paying the taxes, etc., satisfied the jury of an actual possession in the ancestor, was a question for the jury; and that, in a proper case, it was the duty of the court to explain the evidence given to the jury.

That, as to the other point, two of the judges were of opinion that the holder of a final certificate of purchase and payment from the United States land office, has a right of entry, upon which he may recover, against one showing no title, and relying upon a mere naked possession; while the other two judges thought differently.

This division of opinion operates to overrule the motion for a new trial.

166] *JAMES ROSS v. SAMUEL PAGE.

Keeper of a ferry from the Virginia to the Ohio shore, across the Ohio river, landing persons upon the lands of the keeper of a ferry on the Ohio shore, is a mere trespasser, whom chancery can not restrain by injunction.

THIS cause was adjourned from Jefferson county for decision here. It was a bill in chancery seeking the aid of equity to enjoin the owner of a ferry from the Virginia shore of the Ohio river to the Ohio shore, from landing passengers on the complainant's land, who also owned and kept a ferry from the Ohio to the Virginia shore. The case made by the allegations and proofs is briefly this:

The complainant claimed to own the lands on the Ohio shore; had been in possession and kept a ferry under a regular license, for about thirty years. The ferry on the opposite side of the river had also been long established and regularly kept. For a time, the landing of both ferries were at the same places on both sides.

On the Ohio shore, the landing was at the junction of certain streets, from which, in 1816, a road was regularly laid out and used to low water of the river. The complainant had previously removed his ferry to another point. The road became disused, and went out of repair. The respondent, to fit it for use, entered on complainant's lands adjacent, and dug and carried away earth for that purpose. He also landed passengers at that place, and there received them on board his boat for conveyance to the Virginia shore; but for this last he charged no ferriage.

B. T. WRIGHT and TAPPAN, for complainant, contended that the only question raised was, has a licensed ferry-keeper from the Virginia shore of the Ohio river a consequent right to land his passengers on the lands of a licensed ferry-keeper in Ohio, and gratuitously take passengers from the Ohio shore, which otherwise would be compelled to use defendant's ferry and compensate him?

STOKELY and MARSH, contra. This court will not interfere to restrain a mere trespass, even when the right is clear, save only to prevent irreparable and irremediable mischief to the inheritance, and leaves all other cases to the ordinary remedy of the courts of law. Jerome et al. *v.* Ross, 7 Johns. Ch. 315, is a very strong case, and the cases there cited. Hart *v.* Mayor *of Albany, 3 [167 Paige, 213; Stevens *v.* Beekman et al., 1 Johns. Ch. 318.

By the COURT:

The court are satisfied that the complainant has no exclusive right to the ferry; if the respondent can find a place to land his boat, without touching the complainant's land, he does no wrong to the complainant by keeping up the ferry. It follows that the injury, the *gravamen* of the complaint, is not the invasion of the ferry franchise, but trespass upon the land across which the passengers find their way to and from the shore and the boat.

Is this a case for restraining a mere trespass by injunction? Where the trespass amounts to waste, going to the destruction of the estate, and producing an injury for which pecuniary compensation can not be made, chancery may be called upon for its aid to stay the mischief by injunction. Chancellor Kent, 7 Johns. Ch. 315, reviewing the cases on this head of chancery jurisdiction, says

he "knows no case in which an injunction was granted to restrain a mere trespass, merely because he is a trespasser, without showing the property itself was of peculiar value, and could not well admit of a recompense, and would be destroyed by repeated acts of trespass. In ordinary cases, the damages to be assessed by the jury will be adequate for a check and for a recompense. It would require very strong evidence of the inefficacy of legal remedies for compensation as well as for correction, before this court will assume a jurisdiction heretofore unknown." We consider the case cited as conclusive of the one before us.

It is not a suit asking the interference of chancery, because the trespassers are without property, and unable to respond in damages. This is not to be presumed, but must be shown before chancery will pass by the ordinary remedies and interpose its extraordinary aid.

It would be a further objection to granting the complainant the relief prayed for, that he has not established his right at law. So far from showing the better right, the case as it now stands rather invests the respondent with it. The proofs show that a road runs to the river which has become disused and ruinous. This road seems to have been regularly laid out, and if it had not, it is shown to have been used for eighteen years. A much shorter time of use has been held evidence of a highway. It was the right of the re-
168] spondent to repair this road, and if he *dug the soil of the complainant to be applied to this purpose, even if he went upon the adjoining land to construct a road because the ordinary path was out of repair, it could in no legal view be regarded but a mere trespass.

Bill dismissed.

Chauncey Bush *v.* D. R. Ellsworth.

Quære: Is the plaintiff in assumpsit by him, as indorsee against the maker of a note, upon the plea of *non assumpsit*, without affidavit, under the law of Ohio, *bound to prove the indorsement* of the note?

Error from Huron. The plaintiff declared in the court below, as indorsee of a promissory note against the defendant as maker. *Non assumpsit* was pleaded without affidavit, and issue taken.

At the trial in the common pleas, the plaintiff offered no evidence of the indorsement of the note, and the court held such evidence necessary to enable him to recover. A verdict and judgment was rendered in favor of the defendant, to reverse which, for the error of the court in requiring such proof, this writ is brought.

The act of assembly of January 21, 1817, dispensing with proof in certain cases, 18 Ohio L. 13, provides, so far as relates to the matter before the court, "that upon plea of *non assumpsit* or *nihil debet*, offered by the person charged as the *maker* of any *promissory note*, it shall not be necessary for the plaintiff to prove the *execution* of the note upon which suit is brought, unless the party offering such plea shall make affidavit of the truth thereof."

On December 18, 1823, 29 Ohio L. 123, this act was revised and extended to embrace other subjects, and as to the matter under consideration, was made to read, "that upon plea of *non assumpsit* or *nihil debet*, offered by the person charged as the *maker* or *indorser* of any *promissory note* or *bill of exchange*, it shall not be necessary for the plaintiff to prove the *making* or *indorsing* of the *note* or *bill of exchange* upon which suit is brought, unless the party offering such plea shall make affidavit of the truth thereof."

*The single question in the case was, whether, under the [169 last law, the plaintiff was required, under the plea of *non assumpsit*, without affidavit, to prove the indorsement of the note.

The COURT was divided in opinion, Judges COLLETT and WOOD being of opinion that the plaintiff was bound to prove the indorsement of the note; Judges LANE and WRIGHT being of a contrary opinion. Judgment affirmed.

EBEN. WILLIAMS *v.* H. CHAMPION AND E. GOODRICH.

A party having rights under a contract, disclaiming those rights under a mistake as to their character, is not concluded by such disclaimer; nor is he affected if another purchased in consequence, if that other has abandoned the purchase, and does not claim the protection of being an innocent purchaser, without notice.

Where a purchaser of land has performed in part the terms of the contract,

and the failure to perform the residue is occasioned by circumstances which neither party could control, equity will arrange a just compensation, and charge it upon the land sold.

THIS cause was adjourned for decision here, from the county of Geauga. It was a bill in chancery, seeking the specific performance of a contract, or compensation in money. The material facts of the case were as follows: In January, 1818, the complainant purchased of the respondent, Champion, six hundred and sixty-six acres of land, at the aggregate price of three thousand five hundred and sixty-two dollars. Payments thus: on demand, one thousand three hundred and eighty-four dollars and seventy-seven cents; on October 1, 1818, seven hundred and twenty-five dollars and seventy-seven cents; on October 1, 1819, seven hundred and twenty-five dollars and seventy-seven cents, and on October 1, 1820, seven hundred and twenty-five dollars and seventy-seven cents, with interest. Within these periods, complainant paid five hundred dollars, and effected sales of part of the land to others, to the amount of three thousand one hundred and ninety-eight dollars and fifty cents, and there remained two hundred and fifty-seven acres of the land unsold. On August 5, 1820, a new contract was made between the parties. In consideration of the five hundred dollars paid by Williams, Champion agreed to convey to Williams' son eighty-two acres; he agreed to accept the contracts 170] for the lands sold by Williams, to constitute *Williams his agent to sell, of the remaining one hundred and seventy-five acres, one hundred at not less than ten dollars per acre, and when the sale was effected, to convey to Williams the remaining seventy-five acres, as compensation for his agency in the whole contract. Williams made continued efforts to effect the sale of the one hundred acres, at the price stipulated, but could not succeed. In May, 1825, Champion conveyed all the lands and contracts in question to the respondent, Goodrich, who had married Champion's daughter, as part of her marriage portion, expressly making the transfer subject to the right of Williams. Subsequently, in conversation with Goodrich, Williams admitted he had no right to the land, but claimed compensation in money from Champion. Goodrich sold the land to Tuttle, but no purchase money has been paid, or deed delivered. Tuttle makes no defense.

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HITCHCOCK, E. WHITTLESEY and NEWTON, for complainant.

No argument for the respondents.

By the COURT:

The defense that has been relied upon by the respondents, in arguments on the circuit, may be thus stated:

1. Williams abandoned his claim in 1825, by declaring his expectation of compensation, in damages, from Champion.

2. The claim is extinguished by lapse of time.

3. Williams knew of the sale to Tuttle, and neither asserted his claim, nor made other objection.

The contract of 1820 gave Williams a right to demand the conveyance of seventy-five acres, upon completing sales of the residue of the original tracts sold to him in January, 1818. Much the larger portion of these tracts had been then sold, so that Williams had paid the greater portion of the consideration for the seventy-five acres. He continued, up to 1825, assiduous to effect a sale of the residue, upon the terms agreed on; but he was unsuccessful. At that time, Champion, by conveying to Goodrich, put an end to the contract, and disabled Williams from performing that portion of it that remained unperformed. Williams' subsequent assertion that he did not look to the land, but to Champion, for damages, we are satisfied was made under a mistake as to what were his rights. Nothing in the case sustains the idea of abandonment. Whilst the contract existed, *he sought to perform it. When [171 the other party put an end to it, Williams still asserted his right under it, though not in the form he now asserts them. There is no pretense to sustain the position of a voluntary abandonment.

Lapse of time never extinguishes the rights of the parties, merely as lapse of time. It does so when a time for doing an act is fixed, and the party to whom it is to be performed forthwith evinces his intention to put an end to the agreement, so soon as the failure to perform at the time fixed has occurred. In this case, no time of performance is fixed. Champion himself first put an end to the contract by the conveyance to Goodrich. Williams, at all times previous, was assiduous in his efforts to perform. His conduct evidenced no intention to abandon. Under the contract, Champion had no right to preclude Williams from completing the performance, after having received the benefits of his part performance.

Neither Champion nor Goodrich can place themselves in Tuttle's

shoes. No case of innocent or deceived purchase can be made but by Tuttle, or those claiming under him. Neither make any claim. We find nothing in the whole case to preclude the complainant from suitable relief.

The mode of administering that relief presents some difficulty; but, in our opinion, it is not insurmountable. The contract between Williams and Champion, as readjusted in 1820, rested, partly, upon a previous part performance by Williams, and partly upon a performance thereafter to be made. That it was not performed is chargeable upon neither. As he has not performed all that he was to perform, the complainant can not equitably demand a whole performance from the other contracting party. But he may justly claim an apportioned remuneration. To ascertain this, the cause is referred to a master to ascertain what is the fair and ordinary commission for the sale of lands, in like circumstances, in the vicinity of those lands. The sum ascertained to be due to be a charge upon the seventy-five acres of land until paid; in default of which the court will direct a sale.

172] *Executors of J. Wilson, deceased, and John Abraham v. Benjamin Tappan.

Where continuous litigation has existed between parties to a contract, in a legal view affirming its existence, it can not be considered as abandoned, that one party may have made declarations to that effect.

Where time is not of the essence of the contract, specific performance may be decreed against a purchaser, if a good title can be made at the time of the decree.

A will made in a sister state must be recorded in Ohio, before title to land vests in the devisee.

Vendor of land must pay taxes until conveyance is made, if not otherwise stipulated. Permitting sale for taxes so stains the title that he can not ask specific performance.

This cause was adjourned here for decision, from the county of Jefferson. It is a bill in chancery, in the nature of a bill asking the specific performance of a contract for the sale of lands, by the

vendor against the vendee. Many allegations and some testimony were introduced, extrinsic of the grounds upon which the cause was decided. It is only necessary to state so much of the case as is necessary to a full understanding of the points determined.

On June 23, 1825, Wilson and Abraham entered into a contract with Tappan for the sale of four hundred acres of land in Tuscarawas county. The price to be paid was two thousand dollars, in two equal annual payments. Tappan executed his notes, one for one thousand dollars, payable June 23, 1826, and one for one thousand dollars, payable June 23, 1827. Wilson and Abraham executed to Tappan their bond to convey him the land when the notes should be paid, if paid and contented as they became due. The first note was paid about the time it became due. The second note was not paid when it fell due, nor until after suit brought. It was discharged in September, 1829.

Wilson and Abraham purchased the land of the devisee of one Bruff, of the State of Maryland, whose will, duly proven in that state, was not put upon record in Tuscarawas county, Ohio, until the year 1831.

The contract of sale contained no stipulation which party should pay the taxes. Wilson and Abraham paid them for the years 1825 and 1826. For the taxes of 1827, the land was sold, and no redemption effected by either party within two years from the time of sale.

On July 26, 1830, the whole purchase money having been paid previously, and a suit brought on the title bond by Tappan, that suit was dismissed. It was Saturday; and in the *afternoon [173 of that day, a deed was demanded. Early on Monday, July 28, Tappan commenced an action of assumpsit, to recover back the purchase money. In the after-part of the same day, a deed was tendered but refused. In the action thus commenced, Tappan obtained a verdict and judgment for his purchase money, with interest. This bill was brought to coerce him to accept the title, and to enjoin him from collecting the amount of the judgment.

LEAVITT and SUTHERLAND, for complainants, contended:

That, abstracted from any considerations connected with the trial at law, they are entitled to the relief prayed for in the bill:

1. The vendors, Wilson and Abraham, were guilty of no failure

on their part, amounting, in equity, to a forfeiture or rescission of the contract.

2. The incumbrance growing out of the tax sale was one for which the vendors were not responsible, having been created by the default of the defendant, whose duty it was to pay the taxes upon the land, from the time of the contract, especially as he was in actual possession.

3. The alleged defect of title in the vendors, predicated upon the fact that Bruff's will was not placed on record in Tuscarawas county, before the suit at law was brought, will not be deemed, in a court of equity, as vital or material, as it was susceptible of a remedy, and has been remedied by the record of the will in due form; so that there now exists no objection to vendor's title. 7 Ves. 202; Jeremy Eq. 456, 463.

Defendant, contra.

Judge LANE delivered the opinion of the court:

The deed which the complainants covenanted to deliver to the respondent could not be claimed by him until he had made full payment, which was in September, 1829. It was tendered, after demand made, in July, 1830. But between July, 1829, and September, 1830, a suit was pending, brought by Tappan against Wilson and Abraham, on the contract of sale, thus affirming it as in force, notwithstanding expressions used by him, declaring his unwillingness to accept a deed. Under these circumstances, it is not 174] perceived by the court, that either the lapse of *time, or any other obstacle of that nature, precludes the complainants from asserting their right to a specific performance.

The complainants stipulated to give such a deed as should transfer a *good legal estate* to the defendant. It is not indispensable, in these cases where time is not of essence, that the capacity to make a good title should exist, at the time of its stipulated performance, nor even at the time of filing the bill. It is sufficient if the title can be made good when the case is heard, or even at the master's report. 7 Ves. 202. But the purchaser will not be compelled to take a doubtful title. 3 Bligh's P. C. 162; 6 Madd. 159. We are therefore led to consider if a good title can be now made under the direction of this court.

The land was patented to Bruff and bequeathed to his daughter,

who conveyed to the complainants. This will, though proved and recorded in Maryland in 1816, was not admitted for record in this state until 1831. It has been often decided, and this course of decision was followed in the trial between these parties, at the term of October, 1831, that the title of the devisee was not complete until the record was made of this will. While it continued unrecorded, the complainants were unable to convey "a good legal" estate. Tappan could not be compelled to accept a title; but this difficulty was removed after the trial at law, and now will not prevent the execution.

The taxes upon the land were paid by complainants during the years 1825–26; but the lands becoming afterward delinquent, were sold for the taxes of 1827–28. This tax sale is a stain upon the title, rendering it at least doubtful, and no performance will be ordered unless it is removed, or unless some fact be shown exonerating the complainants from the consequences of this imputation.

The complainants insist the case furnishes this excuse in the position, that after a contract for a sale, equity imposes upon the purchaser the duty of paying the taxes himself, and that the incumbrance is produced by his negligence.

The parties to this contract might frame their own terms, but when they reduce it to writing, the writing shows them. By this title bond the complainants stipulated to convey a good legal estate on June 23, 1827, on the payment of principal and interest. They now seek to multiply the conditions of the contract, and to make the conveyance of a good legal estate to depend on the payment of principal, interest, and *taxes. There is [175 nothing in the terms of the writing which creates the obligation, and we do not think the mere relation of purchaser necessarily produces this effect. Possibly, if Tappan were asking a specific performance, he might be compelled, *in the account*, to reimburse taxes paid by the vendor, on the principle that all the profits and all the burdens of the estate passed to him, in equity, by the contract. We give no opinion on this; but that the complainants were, in the first instance, chargeable with the payment of the tax seems plain, as they were the legal owners; and if the contract had been fully executed, the warranty in their deed would have indemnified Tappan against any such lien. The complainants themselves adopted this construction by keeping down the taxes for two years.

It is for the next two years that the delinquency occurred, and the complainants insist they have become chargeable to the defendant because the time had elapsed in which the money ought to have been paid by Tappan. We can not so interpret the duties of the parties. Perhaps complainants might rescind; but if they chose to keep the contract open, they must keep themselves always ready to perform their stipulation, and on enforcing the payment of the money, they must still be able to convey the *same good legal title.* To maintain this ability, they must keep down the taxes and preserve the title, for the same reasons as before the time of payment, whatever may be the respective rights of the parties in taking the account.

There is another consideration which weighs much in the present case. The title has never been in a situation where a court of equity could compel Tappan to accept it. The complainants had not acquired the title from Bruff until 1831, until which time they could not enforce its specific execution, and Tappan was justified in withholding payment until this difficulty was removed. While matters remained in this situation, equity would not hold Tappan bound to advance the taxes upon land, whose title he was at liberty to reject.

Another view may be taken of the present case, which satisfactorily shows the impropriety of extending the present relief. The complainants, in 1830, tendered a deed, containing the covenants of warranty, which is now on our files, ready to be delivered, if we require this contract to be executed. The contract of warranty contained in the deed is general in its terms, assuring the 176] title of the land to the grantee against all claims existing *at the time it takes effect, and the law will not permit its operation to be limited by any explanatory evidence. The tax claim arose in 1828, and now hangs over the title. It is, therefore, one against which the deed assumes to defend. If, then, we give complainants the relief they ask, and compel the defendant to execute this contract, and enjoin the judgment he recovered, we compel the complainants to deliver him the deed, by which he acquires a new right of action, to recover the same money contained in the judgment we enjoin.

Bill dismissed.

Judge Wood dissented; Judge Wright, having been of counsel, did not sit.

JAMES TAYLOR *v.* MIAMI EXPORTING COMPANY AND OTHERS.

A bank may receive from the stockholders transfers of stock in payment of debts previously contracted by them; and at a distant day subsequent, equity will not compel the party to reinstate his stock.

If one purchase of the bank a large amount of stock to multiply his votes for a board of directors, vote upon such stock, and immediately after the board direct that the purchase money of the stock be returned, and the stock again taken by the bank, equity will not compel the purchaser to refund the money and take back the stock, where the proofs show no actual loss attendant upon the transaction.

THIS is a suit in chancery, adjourned from Hamilton county. The bill states that complainant was, prior to September 1, 1818, a stockholder in the Miami Exporting Company, and on July 14, 1818, contracted a debt with said company for three thousand dollars, upon a pledge of his stock, upon which suit has been instituted, and they are pressing it to judgment, notwithstanding the pledge of stock, and notwithstanding they have paid him no dividends. Complainant avers that the interests of the company have been greatly mismanaged and their rights abused, and the capital stock nearly all squandered; that illegal by-laws have been made, by which the company has been paralyzed so that they have been unable to pay off their notes, whereby the credit of the company was *impaired, and the stock depreciated; and especially, [177 that without authority, and for the purpose of ease and favor to themselves and others, on September 22, 1818, the board of directors adopted an illegal resolution, which was made known to but few, whereby it was agreed to accept a transfer of stock in payment of debts due, thereby enabling those that were indebted to withdraw what they had paid in upon stock; and that certain of the defendants, as named in said bill, made transfers under said resolution, amounting in all to one hundred thousand seven hundren and seventy-six dollars and thirty-one cents, and thereby withdrew so much of the capital stock of said company; and under another resolution of May 8, 1821, of a similar character, forty-six thousand one hundred and nine dollars and ninety-six cents of the capital stock of said company was transferred in payment of debts due, which, added to the sum withdrawn under the resolution of September 22, 1818, makes the entire amount of capital stock thus

withdrawn one hundred and forty-six thousand eight hundred and eighty-six dollars and twenty-seven cents, since September 22, 1818, and prior to January 1, 1823, and in which complainant has an interest in proportion to his stock; the whole amount then (that is, on September 22, 1818,) paid in being four hundred and seventy-nine thousand six hundred and forty-five dollars and thirty-one cents, and his stock twenty thousand dollars. It is then stated that William Barr, on or about May 21, 1821, subscribed for six hundred shares of the stock of said company—one hundred shares in his own name, one hundred in that of S. Patterson, one hundred in that of J. Sterret, one hundred in that of D. Griffin, one hundred in that of J. Riddle, and one hundred in that of Samuel Perry—for which he paid sixty thousand dollars, making the capital stock paid in five hundred and thirty-nine thousand six hundred and forty-five dollars and thirty-one cents; and that subsequently, on June 5, 1821, by resolution, the board of directors (the said William Barr, Samuel Perry, David Griffin, James Riddle, and John Sterret being members, and present, voting in the affirmative,) agreed to take back the stock, and did accordingly take back fifty-nine thousand dollars of stock, and refunded to Barr fifty-nine thousand dollars of the capital stock of said company, in conformity with some fraudulent agreement, made previous to the taking of said stock, and for the purpose of securing their own
178] election; which, added to the sums withdrawn *under the resolutions of September 22, 1818, and May 8, 1821, makes the total amount withdrawn two hundred and five thousand eight hundred and eighty-six dollars and twenty-seven cents, since September 22, 1818, and for which there is nothing to show, leaving a balance of three hundred and thirty-three thousand seven hundred and fifty-nine dollars and four cents of the capital stock, which has been sunk and totally lost by the mismanagement of the affairs of the said company; and this loss will fall upon complainant and others if those who have withdrawn the amounts paid by them are permitted to hold the same. The bill closes by a prayer that those who have transferred stock may be compelled to resume the same, and pay their debts, and meet their proportion of the losses of the said company, and that William Barr be decreed to refund the fifty-nine thousand dollars withdrawn under the resolution of June 5, 1821, and reinstate his stock therefor, and for relief generally.

The answer of the Miami Exporting Company admits the act of incorporation, and that complainant is the owner of twenty thousand dollars of the stock of said company, and was in indebtedness and pledge of stock as stated in the bill, and that no dividends have been declared since April 1, 1821, soon after which they learned they could not pay dividends, though they had paid complainant his dividends previously. They say that complainant acquiesced in the necessity of stopping dividends, and deny that he demanded any dividends since April 1, 1821. They deny that they have abused their rights, mismanaged the capital stock of said company, or violated their charter by the adoption of illegal resolutions. They admit the resolution of September 22, 1818, but deny it was passed to defraud any stockholder or creditor, or that it was known only to a few, and adopted only for a select few, but that it was general and as public as any other of their resolutions; that it was in force a long time and generally known, and that all stockholders indebted were entitled to the benefit of it, and that when passed they were redeeming their notes with specie, and their credit was unimpaired, and their stock was believed to be worth more than par, and was then selling, and continued to sell for a long time after it, at par. They considered they had the right to pass that resolution, and then believed it for the benefit of the stockholders, and, as far as they know, the stockholders acquiesced in that resolution, and manifested *their confi- [179 dence in that board by their re-election. They admit a transfer of stock, as stated in their answer, under this resolution, to the amount of ninety-six thousand seven hundred and seventy-six dollars and thirty-one cents, and not one hundred thousand seven hundred and seventy-six dollars and thirty-one cents, as stated in the bill, and that they were, *bona fide*, for a fair and valuable consideration in payment of debts. They admit the resolution of May 8, 1821. They deny that it was fraudulent; they state that by it one-half of the stock owned by any stockholder was authorized to be transferred in payment of debts, as the stock was not greatly depreciated, and that the remaining half would be sufficient to cover their proportion of losses, and they believed that by this resolution they were promoting the interests of the said company, and that the whole amount of stock transferred under this resolution, as therein stated, was thirty-five thousand five hundred and fifty-seven dollars and sixty-eight cents, which, added to that

transferred under the resolution of September 22, 1818, amounts to one hundred and thirty-eight thousand eight hundred and twenty-two dollars and ninety-four cents, and not one hundred and forty-six thousand eight hundred and eighty-six dollars and twenty-seven cents. All these transfers are alleged to have been made in good faith, without any intention of fraud. They admit the capital stock paid in to be four hundred and eighty thousand six hundred and forty-five dollars and thirty-one cents. They deny that Barr *subscribed*, on May 21, 1821, for six hundred shares of the said company, but on that day he came into the office of said company and directed the officers of the company to charge on the books of the said company six hundred shares of the said company, as alleged in the bill, and that the money was paid in. They admit that the stock was not charged upon the books, though entered upon a piece of paper in the said office, and they admit the resolution of June 5, 1821, and set it out at large, but say the stock when taken back was well worth as much as it was when taken by Barr, and the company sustained no loss, and no fraud was intended; and though said stock was voted on May 22, 1821, yet stock so taken did not elect the board, as there was a heavy majority without it. They deny that complainant ever applied to adjust his account, but, as they understood, set up some extravagant claim against the said company. They state, by a resolution of November 6, 1823, there was a consolidation of stock partially 180] paid in, so as *to reduce the stock to the amount paid in, from which deducting the transfers left three hundred and forty-two thousand nine hundred and ninety-two dollars and thirty-seven cents of capital. The debts owing amount to ninety-nine thousand dollars, which, added to the capital, makes four hundred and forty-one thousand nine hundred and ninety-two dollars and thirty-seven cents. The debts due, they say, are about four hundred and thirty-eight thousand eight hundred dollars, and real estate seventeen thousand three hundred and twenty-nine dollars and fifty-nine cents, and depreciated paper three thousand two hundred and ninety dollars. Total, four hundred and fifty-nine thousand four hundred and nineteen dollars and fifty-nine cents, upon which there will be very great loss. They say they have made great exertions in attempting to collect, and have expended about nine thousand dollars in charges upon that account; and they say that there is considerable stock held by those who have transferred, and in the ag-

gregate it amounts to one hundred and twenty-three thousand and fourteen dollars and five and a half cents. For further particulars, they refer to their books. They say that all the stock transferred was transferred by the holders thereof, and transferred at par, and that the stock transferred under the resolution of September 22, 1818, was believed to be at par value, and after said resolution was rescinded, stock was sold at par for cash, and they believe that that transferred under the resolution of May 8, 1821, was worth ninety cents, down to seventy cents on the dollar, stock varying, in 1821, from par to seventy dollars per share. They deny all fraud, etc.

The answers of the other defendants all concurred in denying fraud, and asserting that the sales of stock were effected in good faith. Some controverted the legality of the complainant's ownership of stock. Some insisted on the statute of limitations. Thomas D. Carneal alleged that the complainant should refund eleven thousand nine hundred and twenty dollars received for dividends upon stock that he could not legally own.

Fox, for Barr:

In relation to that part of the bill in which he is charged with having subscribed for six hundred shares of the stock of the company, on May 21, 1821; of his having paid for those shares, and of the contract having been rescinded by a fraudulent vote of the directors on June 5, 1821, he denies ever having *subscribed* for these shares, and calls upon *the com- [181 plainant for proof of the fact. He admits that on the day mentioned, himself and some others agreed to make an application to the officers of the company for the purchase of six hundred shares; that respondent accordingly applied to the president or cashier for the purchase of the stock, viz: one hundred shares in respondent's name, one hundred in Samuel Perry's name, one hundred in David Griffin's name, one hundred in Samuel Patterson's name, one hundred in John Sterret's name, and one hundred in James Riddle's name, having been by them authorized so to do.

He also admits that Miami Bank paper, and checks of individuals, to the amount of sixty thousand dollars, were placed in the hands of William Oliver, cashier of the bank, to be applied in payment of the stock, in case the application should be approved by the president and directors of the company. But he denies that

the checks were ever charged to the drawers, or that the money was ever entered on the books of the company, either as a charge or credit against or for the company or any other person. He denies that any entry was ever made of the transaction on any of the books of the company, except the resolution of the 5th of June, hereafter set forth. He further shows the following resolutions were passed by the stockholders and by the directors, which are made part of the answer:

"OFFICE OF THE MIAMI EXPORTING COMPANY,
"CINCINNATI, *May* 2, 1814.

"Agreeable to notice, the shareholders of the Miami Exporting Company met at their office, in order to take into consideration the expediency of increasing the stock of said company. Messrs. Arthur St. Clair, jr., Thomas Williams, and Josiah Halley were chosen judges, and O. M. Spencer, clerk. A motion was made that the president and directors of the Miami Exporting Company be authorized and empowered to create as many new shares of the stock of said company as in their opinion may be necessary to supply the demands, and to sell them on such terms or considerations as they judge most advantageous to the stockholders, until the first day of November next. On counting the votes, there being sixteen hundred and eighty (all the votes present) in favor of the above motion, it was accordingly carried. Signed by

"ARTHUR ST. CLAIR, JR.
THOMAS WILLIAMS,
JOSIAH HALLEY,
"*Judges of the election.*"

182] *"*May* 3, 1814.

"The following resolutions were unanimously adopted. The president and directors of the Miami Exporting Company, by virtue of the power vested in them by the stockholders, at their meeting on the 2d inst., resolved to create *six thousand* new shares, of which they will now put into the market fifteen hundred shares, on the following terms, viz:

"1. The present shareholders shall be allowed to subscribe to the amount of fifteen hundred shares, in proportion to the amount of stock they now severally hold, for which they shall be charged with a premium of ten per cent. This charge shall be made on the deposit accounts.

"2. On this stock the proprietors shall not be required to make any payment until the expiration of six months, but shall be allowed, if they wish so to do, to pay on each share the sum of fifty dollars, or any less sum. Beyond the sum of fifty dollars per share, no payment shall be received on this stock until the same shall be authorized by a resolution of the board of directors.

"3. After the expiration of six months, the directors shall have power to require payment on this stock, provided that no installment shall exceed twelve dollars and fifty cents per share, of which thirty days' public notice shall be given previous to the payment of each installment.

"4. In subscribing for this stock, any subscriber who now holds one share shall be allowed to subscribe for one more; every subscriber who now holds three shares shall be allowed two more, and every subscriber who now holds five shares shall be entitled to three new ones, and every subscriber who holds more than five shares, and has an odd share, shall not be entitled to a new share for such odd share.

"The president and directors of the Miami Exporting Company also put into the market fifteen hundred shares on the following terms, viz:

"1. This stock shall be sold at an advance of ten per cent. The whole amount of this advance shall be placed to the credit of the deposit accounts of the present stockholders, in proportion to the stock which they now hold.

"2. At the time of subscribing, the premium of ten dollars, and also the further sum of five dollars, shall be paid on each share. At the end of each sixty days after subscribing, the further sum of fifteen dollars shall be paid, until each share shall *be [183 paid up to fifty dollars, beyond which amount of fifty dollars no payment shall be made on any share, unless the same shall be authorized and called for by the board of directors.

" 3. The remaining fifty dollars on each share shall be payable when called for by the directors, by installments not exceeding twelve dollars and fifty cents, of which payment at least thirty days'. previous public notice shall be given, and two installments shall not be required within sixty days of each other.

"4. The subscribers for the above-mentioned stock shall be at liberty to pay their installments faster than is herein required, until their payments amount to fifty dollars on each share.

"5. No individual shall be permitted to subscribe *for more than twenty-five shares on one day, nor shall any individual* be allowed to subscribe for more than twenty shares within any period of ten days.

"6. It shall be the duty of the officers of the bank to exercise a discretion in receiving subscriptions, *and they shall take memorandums of applications, and lay them before the directors for their approbation.* By order,

"O. M. SPENCER, *Clerk.*"

He then avers that the president and directors never did approve of the application to purchase; on the contrary, the only entry ever made on the books of the company, in any manner relating to the application to purchase, was a resolution passed on June 5, 1821, in the following words: *Resolved*, That the stock purchased by Wm. Barr, James Riddle, David Griffin, John Sterret, Samuel Patterson, and Samuel Perry, on the 21st of May last, being six hundred shares, shall not be charged to their accounts, and that the cashier be, and he is hereby authorized and directed, to return the whole amount of moneys deposited for the payment of said shares, excepting one thousand dollars, to be applied in full payment of five shares retained by David Griffin, and five shares by John Sterret, thereby disapproving of said application. He admits the checks and money were then received back from Oliver, and the whole matter considered at an end. No certificate, nor any transfer of stock, was ever made or delivered to any of said persons named, except for five shares to Griffin, and five shares to Sterret. He denies that any fraud was intended in this transaction.

He denies that the president or cashier had power to make a sale of stock under said resolutions, without the sale was ap-
184] proved *of by the board of directors, and that after November 1, 1814, he denies the power of the board of directors to create or sell any new stock. He also denies the power of the company to make a legal contract for any new stock, there having been already more than five hundred thousand dollars capital created.

He insists the complainant has remedy at law, has shown no title to equitable relief, etc.

V. WORTHINGTON, for complainant:

The Miami Exporting Company was incorporated on April 15, 1803, 1 Ohio Stat. 126, to continue until May 1, 1843, and was permitted to hold goods and chattels, lands and tenements, to an amount not exceeding five hundred thousand dollars. By section 3 of the act of incorporation, the capital or joint stock is limited to one thousand shares of one hundred dollars each, unless by the assent of a majority of the stockholders. 1 Stat. 128.

By section 5, the office of the company is fixed at Cincinnati, and the sole management of the funds of the company is given to the president and directors for the use and benefit of the stockholders, according to their respective interests therein. By this section, the directory have power to fill vacancies in their own body. 1 Stat. 130.

By section 6, they are authorized to appoint agents, clerks, etc., fix their compensation, make shipments, and dispose of the funds of the company for the purposes contemplated, in such manner as they shall adjudge most advantageous to the stockholders. 1 Stat. 130.

By section 8, they are enjoined to vest at least one-half of all cash received on shipments in produce and manufactures. 1 Stat. 132.

And by sections 12 and 13, they are limited in their engagements to the one-half of the actual stock in the funds, and made liable for any excess, except in cases of necessity. 1 Stat. 133.

These are all the powers given to the president and directors over the stock of the company. Shortly after its incorporation, the company went into operation, and soon increased their stock to three thousand shares, at which it stood till May 1, 1814, when, by a vote of the stockholders, the stock was increased to six thousand shares, fifteen hundred of which were to be divided, *pro rata*, among the then stockholders, and the *residue put into market [185 upon certain terms. Of the original stock, complainant held, on May 1, 1814, seventy-four shares, took his proportion of the reservation, thirty-seven shares, and purchased eighty-nine, making his entire stock two hundred shares.

In September, 1818, the directors, without the assent of the stockholders, passed a resolution authorizing the officers of the bank to receive transfers of stock in payment of debts, and again, in May, 1821, they, of their own accord, authorized the stockholders to transfer a proportion of their stock to pay regular accom-

modation notes. Under these resolutions, certain stockholders withdrew from the company one hundred and thirty-eight thousand three hundred and twenty-two dollars and ninety-four cents of its capital.

In May, 1821, William Barr takes six hundred shares of the stock of said bank for the purpose of operating upon an election that was about to ensue. He succeeded in his ticket by a majority greater than his additional stock, and after the new board was organized, they agreed to rescind his purchase, and did actually receive back five hundred and ninety shares, and refunded him his money.

The complainant insists that the transfers under the resolutions of September, 1818, and May, 1821, and the Barr transaction, are a fraud upon his rights, and can not be sustained upon principles of justice and equity.

When the complainant became the holder of his stock in this company, he acquired a *vested right* in the whole capital, in proportion to his interest, and no act of the directors could divest *that right*. He had the right to participate in the increase or diminution of the stock, which could alone take place under the direction, not of the board of managers, but the stockholders generally. Banking corporations are now viewed as a copartnership, and the stockholders partners, or, more correctly speaking, the corporation is a trustee for the management of property for certain purposes, and each stockholder a *cestui que trust* according to his shares, and the power of increasing or diminishing the stock fund, according to the original agreement, is a beneficial interest in each subsisting partner, and which the partners or *cestui que trusts* must exercise in proportion to their respective interests in the original stock. If, in the course of events, the stockholders of an incorporated bank under their charter agree to increase
186] their stock, or to diminish it, each *stockholder has the right to participate in proportion to his interest. This right does not belong to the directors, it is reserved to the stockholders.

In the case of Gray *v.* Portland Bank, 3 Mass. 364, recognized in the present case on demurrer, reported in 5 Ohio, 162, and cited in Angell and Ames on Corporations, 312, the positions we contend for are very forcibly sustained. That was a case of an increase of stock. This is a case of a decrease in stock, and no good reason can be perceived why the rule in the one case should not be

that of the other. In that case, the stock was increased by the joint act of the stockholders, but Gray was excluded from participating therein. In this case, not the stockholders, but the directors resolve to reduce the joint capital by taking back the stock of those that are *indebted* to the institution. Is this fair? Is it right that directors who control the joint funds of a stock company for the benefit of the whole, should suffer a portion of the stockholders to withdraw their capital without the consent of the others? A majority of the stockholders could not do this, much less the directors. When the capital is taken, it can not be withdrawn or diverted from the purposes contemplated without the consent of all. It is taken upon prescribed terms, and by them the holder must abide, unless his copartners, one and all, admit his withdrawal or the diversion. This is the practical common sense construction of all contracts, and what is there in bank charter agreements to vary the rule? If it be otherwise, what is to prevent the majority, if there be an advance upon the stock, to appropriate it all to themselves; or, if a loss, to throw it upon the minority? If a majority of the stockholders could not thus divest the minority of their *vested rights*, much less could a board of directors of that majority do it. In the case last referred to, 3 Mass. 383, Judge Sedgwick says, in enforcing the proposition, that a stockholder of the original stock, at the time of the vote to augment the capital of the bank, had a right in the new stock in proportion to his interest in the old stock, of which he might not be rightly deprived by his *partners*, the other stockholders. "At the time of the vote to augment the capital of the bank, all the stockholders were *partners*. The augmentation was supposed to be and intended for the profit of the *joint* concern; the capacity to augment was in virtue of their *joint* interest; and it could only be done by the will of the majority; and that in pursuance of their original association, the law by which *the partner- [187 ship existed, and by which the united interest was regulated, was that alone by which the augmentation could be made. Whenever a partnership adopts a project within the principles of their agreement, for the purposes of profit, it must be for the benefit of all the partners in proportion to their respective interests in the concern. Natural justice requires that the majority should not have authority to exclude the minority. What is there in this case which should make it an exception from that general principle?

There is nothing that I can perceive in the reason or nature of the thing. Suppose it to have been morally certain, that the augmentation would have been double in value to the amount of the money necessary to make it, could a combination of a majority have deprived the minority of their proportion?

"The whole number of shares was one thousand; could the proprietors of five hundred and one have engrossed the whole, and deprived the partners of their share? It is impossible." We all exclaim with the judge, it is impossible. Let us reverse the case and see upon principle if the result be different. A bank with a capital of three hundred thousand dollars gets successfully into operation. A few honest men get control of it, discount freely, not forgetting themselves and friends. In a few years, the bank is clogged—can not get along. Somehow or other, its debtors are many of them insolvent, and those that are not are hard run, but have bank stock and property in plenty. A director proposes that stock be taken in payment of debts, alleging that insolvent debtors may pay in that way, and that the dividends would be increased (see Spencer's deposition), and it is so. The stock is taken, not from the insolvent, but the solvent debtors, to near one-half the capital, and when this is done, it is found that the whole capital is exhausted, and the remaining debts are not worth a pot of porridge. The stockholder, who had no debts to pay, comes forward and asks, how is this? I thought, in these matters, profits and losses were to be equally borne; but you have got all the cash, and left me the bag to hold. Is this just? Does it accord with reason? No. It is impossible. But, nevertheless, such is the case of the complainant; and the defendants, in a body, cry out, we acted in good faith, intended no fraud, and we are all honest men, every one of us. It is true, the stock now is not worth a song; yet it was worth par when we transferred. But they can not tell how or why it is now worth
188] less than then. No mismanagement *since, no bad debts since created, and it is strange that the stock should not be as good now as it was then. So sure are they of the par value of this stock, that they have attempted to prove the stock was par between 1818 and 1821, and they do it by showing that Spencer took a few shares in payment of debts and for Miami paper, and Longworth sold seventy odd shares to John H. Piatt for notes and mortgages, and may be Riddle, Este, and others may have sold some. It seems to me very strange that there should be an attempt to adduce proof

upon this subject, for if the stock could have been sold for par in market, why not have sold it, got the cash, and paid the debts? What necessity was there for the measure? The very fact of the resolutions and transfers are conclusive to my mind, that the stock was not worth par, and could not be sold, saving a few shares, and then not for cash.

But whether the stock was worth par or not, it is immaterial; the charter of this institution, the fundamental agreement by which the several stockholders threw their respective funds into a joint stock, does not sanction a withdrawal of the capital, directly or indirectly; and no device of a majority of the stockholders, much less of the directors, or a minority, can be available to accomplish that purpose. Each stockholder's interest extends to the *whole capital* in proportion to his stock, and can not be taken away but by and with his consent, and of course this reduction of the stock, to increase dividends and obtain payment of debts from insolvent debtors, will not do. No principle that has any kindred to justice or natural right will sanction the position, that a few stockholders, who have created debts to the amount of the stock held by them, can cancel their debts by a surrender of their stock, and thereby sink a failing corporation, and leave the wreck to the unsuspecting that have no debts to pay. I have had some curiosity to know how far the directors that passed those famous resolutions participated in these transfers, and what stock they have retained upon which to enjoy the increased dividends; and I find that all save one (who probably was not present when the resolution passed) are participants, and but few of them now hold stock. Of course, if their design was, as alleged by Mr. Spencer, to increase the dividends, we see how those who contemplated that increase have partaken of it. I have hitherto been disposed to consider these transfers as untainted with actual fraud, and merely void from a *defect or want of power* in the board to sanction them; yet *when I see the directors holding out the idea to the un- [189
suspecting and unindebted, that the dividends would be increased, and debts of insolvents to the bank secured, and in the meantime getting not only out of *debt*, but out of *interest* in the bank, at the same blow, under these resolutions, we are induced to believe that there was something more than the mere stretch of power; it was a breach of faith.

N. WRIGHT, for defendants:

The object of the complainant in this cause, so far as his object is disclosed in the bill, appears to be to have certain contracts, made by divers persons with the directors of the Miami Exporting Company, for the sale and transfer of stock to the corporation, in payment of debts, set aside, on the ground that they were fraudulently made.

Before discussing the merits of the case, we may as well ascertain what has already been done in the cause.

At two successive terms of this court in bank, we understand the demurrer originally filed to the bill was sustained by the then judges, but was continued for further argument.

At the December term, 1831, however, this court, upon full argument, overruled the demurrer, saying that "if the case made in the bill, is one under which facts might be proven, entitling the complainant to any relief, the demurrer could not be sustained." The court further say: "Upon the case made in the bill, the complainant's interest has been destroyed by the acts of his *agents fraudulently performed* for their own exclusive advantage." It is on the ground of this *alleged* fraud, and upon the further ground that the defendant's directors were the *trustees* of complainant, and therefore liable to account, that this court sustained the bill on demurrer.

The case now presented, is a case stripped of everything like actual fraud. All the answers, in the most positive and unqualified manner, deny any fraudulent intent, in making the transfers, to injure or defraud the complainant, or any other person. They all allege, and prove, too, that at the time of these transfers, the stock was selling at par in the public market; that if they had doubted the power of the corporation to receive the transfers, they could have gone into the market and sold their stock, and have paid their debt in some other mode. They all deny there being any secrecy in the transaction. They aver and *prove* that the existence of these resolutions was as publicly known as any other of the 190] transactions of the bank, and that *many of the large stockholders absolutely refused to sell their stock, because they expected larger dividends when the stock became reduced.

That so far from these resolutions being kept secret from complainant, he absolutely refused to transfer any of his stock to pay his local debt due the bank, but wanted to transfer in payment

of a debt, which, by express contract, was payable in eastern funds, and merely deposited with the company for collection. *Vide* depositions of O. M. Sepencer, Longworth, Oliver, and Gano.

Thus it appears the complainant made no objection against other debtors parting with their stock to pay bank debts, but refused to part with his, except at the premium of the difference between western and eastern funds. He not only was *knowing* to these transfers, as appears in proof (and his knowledge is not denied in the bill), and made no objection at the time, but remains perfectly still and quiet until his own debt, which had been due for years, was transferred to the Bank of the United States. Then he comes forward, and claims that contracts entered into in perfect good faith shall be set aside—at a time, too, when it is too late to replace the parties in the same position they formerly occupied. A court of equity, acting as in ordinary cases, would require of such a complainant, not only strong allegations, but proof equally strong and decisive, in support of those allegations. In the present case, there is no proof in support of the fraud charged in the bill.

Let us ascertain, then, if there is any legal fraud in the case.

To support the position of a legal fraud, it is attempted to be established as a legal proposition, that taking a transfer of stock in payment of debts is a withdrawal of so much of the capital stock of the company, and that the directors have no power to withdraw any portion of the capital, but this, if done at all, must be done by a meeting of the stockholders.

But how or in what way was the transferring of this stock, all of which had been previously paid for, a withdrawal of the capital stock of the company?

The stock, when paid for, was a species of property, and of value too—and it was of as much value when transferred to the corporation as it was in the hands of the original holder.

It could not be of less value, supposing the corporation to be perfectly solvent. If the corporation was solvent, the share in the hands of the debtor was worth its one hundred dollars—and it was *perfectly immaterial to the corporation whether it was [191 paid its debts in money or that which was equivalent.

The company not only purchased stock, but they resold the same stock, and, in the case of Highway, at an advance of five per cent. beyond the price they allowed for it (Spencer's deposition),

and also received the regular dividend on this stock, the same as any other stockholder. How the transaction can be construed into a withdrawal of capital, I can not conceive.

But, supposing these resolutions had the effect of diminishing the capital, is it clear and certain the board of directors have no power to make any contract, which may possibly prove a bad bargain, and thereby diminish the capital? Is it clear that the directors of a banking company can not, in the exercise of a sound, honest discretion, receive a transfer of stock in payment of debts due the institution, although they may be satisfied, that unless they take the stock they will get nothing? Must they stand with their arms folded, and refuse to take the only species of property their debtor has to give in payment of the debt due them? Must they refuse to take that which will produce money, because the money itself can not be produced?

We have supposed it to be well settled, that all corporations have an absolute right to purchase and sell at pleasure; that this right is neither limited as to objects, nor circumscribed as to quantity, except specially restrained by its charter of incorporation, or by some other statute regulation. It is not necessary the corporation should have an express power to purchase; this power is incident to the body corporate. 2 Kent's Com. 281, 282.

None of the members of the corporation possess any individual right or privilege in the institution but those which are expressly granted and named.

Why is it the directors who are elected to manage the concerns of the company, have not the power to receive transfers of stock in payment of debts? Not because there is any express prohibition of the exercise of the power in the charter. Not because under all circumstances, and in all cases, the exercise of such a power leads to a direct loss on the part of the stockholders, for it is admitted that the taking a transfer of John Highway's stock, in 1816, operated beneficially for the company; not because the public morals are corrupted by such contracts; not because the corporation do not obtain a consideration for the discharge of the 192] debt. There is no reason assigned in the *plaintiff's argument, except that inasmuch as the shares of stock could not be increased, it follows that they can not be decreased without the direction of the stockholders at one of their meetings.

It would be a sufficient answer to this to say, that if the argu-

ment was to be carried out, nothing could be done without the assent of the stockholders; because no transaction can take place, but what *may* result in the withdrawal of some portion of the capital funds of the company; and if this is to be the criterion of the power of the directors, they are powerless as a body. But let us see if the board of directors are so powerless as is supposed by this argument. By section 5 of the charter of this institution, it is provided "that the president and directors shall open and continue their office in the town of Cincinnati, and shall have the *sole management* of the funds of the company, for the use and benefit of the stockholders," etc.

By this section it would appear that the directors not only have the management, but the *sole* management, of the funds of the institution. The stockholders have no right to interfere in the matter, except so far as their right to elect the directors enables them to change their board. By a clause in section 6, the same directors are authorized to "dispose of the funds of the company in such a manner as they shall judge most advantageous to the stockholders;" and for the purpose of enabling the stockholders to ascertain what is done, the directors are to make "full, fair, and regular entries of all their transactions, in books to be kept at the office for that purpose, which shall at all times be open for the inspection of the stockholders." The directors for the time being are the authorized *agents* of the corporation; and anything done by them in relation to the disposition of the *funds* of the company is binding upon the company, provided it is honestly done. 5 Ohio, 165. It is not contended that the directors could fraudulently combine with others, and by deliberate and intentional act, defraud the other stockholders; but we do contend, that the directors, having the power of managing the funds, are only required to exercise a sound, honest discretion in managing those funds, and in settling with any of their debtors. It is for them to determine whether the debtor is solvent or insolvent, honest or dishonest, and to make the best arrangement they can for the adjustment of the debts due and owing them. On no other principle can any man deal safely with a corporation.

*This corporation and stockholders has, from its first in- [193 stitution to the time of ceasing to do banking business, acted upon the principles here contended for. Hence we find the board, on April 30, 1808, "resolve that the directors may, at any time when

they conceive it to be the interest for the company, receive stock or shares of this company in payment for debts due them." This resolution has been a part of the records of the company to the present time. We find, also, in August, 1808, the company purchasing Israel Ludlow's shares of its stock at a public auction.

On November 23, 1806, the company received of John Highway, in payment of his debt, one hundred and seven shares, at an advance of five per cent., amounting to six thousand four hundred and five dollars. We find this same company reselling this same Highway stock, in 1817 and 1818, at an advance of ten dollars on a share, making a clear profit of five hundred and thirty-five dollars in the trade. It was the understanding of the company, from its first organization, that it had the power of purchasing or receiving stock in payment of its debts.

Again, if it had no power to receive stock in payment of its debts, where did it obtain the power of receiving transfers of stock as collateral security for payment of notes discounted? That the board received a pledge of stock, in lieu of an indorser, to secure the payment of accommodation notes, is notorious. The complainant himself had pledged his own stock to secure the payment of a debt of three thousand dollars, the collection of which debt is now enjoined by the present proceeding.

But it is said that as this operates to reduce the capital, it can only be done with the assent of the majority of the stockholders, because the charter prevents an increase of the stock without such assent.

This position can not, for a moment, be sustained; for the only power which the stockholders have individually reserved, or rather conferred upon them, is the right of voting in the election of directors, and upon the question of *increasing the stock*, and this latter right is the result of the limitation of the directors' power, contained in the first clause of section 3; and by no fair construction of the powers contained in this charter can the stockholders do any valid act affecting the funds or business of the institution. To contend for the contrary is to say that the directors have the *sole* management of the funds, etc., and the stockholders have the *sole* management, etc., which is preposterous. The directors, for
194] the time being, are the company *itself (so far as contracts are concerned); their power is without control, with the single exception of increasing the amount of stock.

This appears manifest when we reflect upon the nature and character of a corporation. It is the creature of the legislature—the expression of the legislative will. The rights and duties of the corporation and of the stockholders must be clearly defined. Neither the collected body of stockholders, nor the individual members, can claim a right not given by the charter. If this is the law, upon what principle can it be said that the stockholders must be consulted at a public meeting to know whether the stock of the company shall be received in payment of debts? The charter gives to the stockholders no voice on the subject. They can exercise no power except those expressly conferred upon them. They have, therefore, no voice in the matter. Angell on Corp. 121; 1 Caine, 390. Their united act on the subject would be void. Whenever a particular business is delegated to a select body, and others join in the performance of it, the act is void. Angell on Corp. 291.

If we resort to other states we shall find the same institutions exercising the same powers in the same way. In Barrington *v.* Bank of Washington, 14 Serg. & R. 416, the cashier had undertaken to receive transfers of stock in payment of debts without an order of the board, and the validity and obligation of a discharge honestly obtained in this way was considered so clear that one of the counsel declined arguing the question, and the judge, in page 422, considers the discharge valid.

The power of the directors to receive a transfer and forfeiture of stock even in payment of the installments due upon the stock, is held binding on the stockholders. 5 Johns. Ch. 383. And persons who surrendered their stock at the time they were owing one-half of the subscription, were decided to be no longer persons composing the company, the contract having been *bona fide.* 5 Johns. Ch. 384; 19 Johns. 480.

I take it for granted, then, that the directors had the power to act in this matter; that they were the authorized agents of the stockholders, and that their principals are bound by all their contracts honestly made. 5 Johns. Ch. 382.

"As respects the arrangement in question, the directors had a general authority to act according to the best of their *judg- [195 ment for the benefit of the bank." "The directors stood in the relation of agents, acting under a general authority, who alone are responsible for an abuse of it. Whether they act provi-

dently or otherwise, is a matter with which the person with whom they contract has nothing to do. They represent their principal, and are of sufficient discretion to contract for him. No man in his senses would contract with a bank on any other terms." 11 Serg. & R. 417.

The directors, then, appear to have had the power to make the contracts in question, and have exercised it. Have they exercised it honestly? Can any man doubt their honesty in the transaction, however they may doubt their wisdom? What motive had either the directors or Samuel J. Brown to injure the company on October 17, 1818, when Brown transferred his two thousand dollars? The directors were all stockholders, and would be affected by the transaction if injurious. But at this time the institution was in full operation; its money was in good credit; its stock worth par at least, and was ten per cent. advance in August, 1818; where was the motive to defraud? This transfer, with that of Baum and Perry, made the day previous, and the one of Carneal, made on the 30th of October, are the only transfers made within four months of the passage of the resolution of September 22, 1818; a resolution which it is pretended was passed with a view to enable the embarrassed stockholders to withdraw the capital stock of the company, and to defraud the larger stockholders; and yet we find, that with this object in view, when the resolution is passed, all the debtors, save and except three, made no move to complete this intended fraud until more than four months have elapsed. They took a kind of leisure time to do this job of fraud!

Again, we find that this bank stock was a pretty marketable commodity; some of the most business men in the city were perfectly willing not only to receive it in payment of debts, but were willing to buy it at par, and transfer bonds and notes secured by mortgage in payment. Longworth says he sold John H. Piatt seventy-three shares for seven thousand three hundred dollars, the par value, in the month of *September*, 1821, and it will be found that there were only two transfers of stock made *after* September 14, 1821. All the transfers, except these two, were made as early as May 22, 1821. Spencer and others were purchasing at par during the years 1819, 1820, 1821.

196] *Again, how can it be pretended that a fraud was intended when it was open for all to transfer?

But it is said those only could transfer who were indebted;

admit this to be the fact, the complainant was not in that predicament, for he then was, and ever since has been in debt to the company, and probably will be as long as he can. But this argument will not be entitled to any consideration when we consider that there were few, if any, of the stockholders that were not indebted to the company; there was no partiality shown in the resolutions; they embraced all the stockholders who were indebted, and all the stockholders were indebted—some, to be sure, more largely than others.

But suppose the complainant could have set aside these transfers, if he had made a timely application for that purpose, can he, therefore, do it at any period of time, and that, too, in a court of equity? Can the *principal*, on being informed that his agent has done an act or made a contract which he disapproves, lie still, permit the person who has contracted with his agent to part with his property on the faith of the contract made, afterward come forward and disavow his agent's acts?

It is a well-settled principle that an authority to an agent may be proved as well by subsequent assent as by a previous power; that a ratification of the act is equal to a previous authority; and that a principal, in order to avoid the act of an agent, is bound to show his dissent at the first convenient opportunity after the transaction is made known to him.

So far from Taylor denying the acts of his agents to be binding upon him, he acknowledges their obligation by himself applying to transfer his own stock in payment of a debt not embraced in the resolution. His objection at that time was not to the power, nor to the fraudulent intention of the directors to cheat and defraud the stockholders. He has, by his own acts, confirmed these transfers, so far as he could confirm them. He voted personally for all the directors of 1820, and, by agent, for all those of 1821; and these were nearly the same as the directors of 1818. He is, by this very bill, confirming a part of said transfers, by alleging that they have been since sold to one of the defendants, whom he is seeking to make liable for the purchase money. And if he has not confirmed them, he has laid by until it is too late for a court of equity to help him. He has laid by and suffered the present respondents to rely upon the contracts which have been made, until it is impossible that *they should be placed in the [197 same situation they were before the contracts were made.

Allow us to enlarge upon this point in the case, and notice particularly its bearings on complainant's claim.

In the first place, he can not have a compensation in damages for a tort; equity has no such jurisdiction. If he could show that any individual director or stockholder had been guilty of a fraud in relation to the affairs of the bank, to his injury, damages for that injury are not recoverable here. Fraudulent acts may, in a proper case, be set aside, and the parties reinstated in their original situation, if no counteracting equity has arisen; but beyond this, equity can not go. This position requires no argument.

In the next place, complainant can not have a decree for any sum to be made up to him, or for the stock to be made good to him, at an estimated or supposed price; nor, indeed, for anything whatever to be paid to him. If he could succeed to the utmost, his decree could go no further than to require the debts to be set up which have been paid in stock, the stock returned, and those debts paid to the bank. To go beyond this would be to dissolve the corporation and distribute its stock before the expiration of the charter, and without a *quo warranto* or any adjudication of a forfeiture. If Taylor can have any portion of the value of his stock paid to him, every other stockholder has the same right; and thus, on application of any stockholder, the corporation may be dissolved and its funds divided, leaving, for aught we know, its debts unpaid and the charter remaining, in full force, on the statute book. After what has already been said in this case, by this court (5 Ohio, 167), it is unnecessary to argue this point.

It is material to keep distinctly in mind, the consequences which may follow such relief as may be granted, with reference particularly to this view of the case, which, of itself, is sufficient to settle the whole. The directors are agents of the stockholders, appointed by them to manage for them the affairs of the bank. If the stockholders are dissatisfied with the acts of those agents, done either with or without authority, it is incumbent on them *promptly* to disavow them, otherwise they are bound by them; more especially are they bound, when the rights and interests of others may be affected by a lapse of time. Let us refer them to some of the consequences which may follow this relief.

198] *Many of the stockholders who transferred stock are since dead; many have become utterly insolvent; many could have sold their stock to others at the same prices and paid their bank debt

with the proceeds; this could have been done, even long after the stock began to depreciate, for the notes of the bank depreciated as much as the stock.

Now suppose we grant, for argument's sake, that the board of directors acted fraudulently in making the orders for the transfers, it can hardly be pretended that every stockholder was guilty of fraud in making his transfer. If Taylor had applied to this court *promptly*, all parties might have been reinstated in their own rights without loss; but now, after so many of the transferring stockholders have become insolvent, if a few who are able to pay have to return the amount of their stock into the common fund, they suffer a loss by the delay, to the whole amount of the insolvencies accrued since the transfers; for the common fund, which must ultimately be divided among the stockholders, is lessened by that amount.

Again, those who might have sold their stock in market, by the acquiescence of the complainant, have lost that advantage.

Again, those who have transferred their stock have had no vote in the management of the corporation for the last twelve or fifteen years; and, for aught that appears or can be presumed, the very management of the complainant and his associate stockholders, during that period, has occasioned the losses and depreciation which occasioned the filing of this bill.

Again, all the transfers by the remaining stockholders, from hand to hand, since that time, were made on the faith of that arrangement; and who, among them, must have the benefit or bear the burden of the result?

Again, all important business arrangements in a mercantile community, like that in question, become entangled in their consequences every month, more and more, with the interests of third persons, in a way which can not be traced by legal investigation, but still in such a way that it is impossible to undo them, after a lapse of time, without great wrong to persons who originally were entire strangers to them.

That the directors are to be regarded as *agents* of the stockholders no one will deny. This court so speak of them in this case; the cases cited by complainant's counsel so treat them, and so in fact they obviously are. In this particular, it is important to keep in mind the distinction between this case and those in *Massachusetts, and that before Judge Story. 3 Mason, 310. [199

Those are cases where *creditors* asserted claims. Should a creditor set up a claim against these transfers, he could probably be sustained, even after such lapse of time; though Judge Story restricted his relief in a very important particular, in consequence of his delay. The creditor has no voice in the appointment of directors; they are not his agents, nor has he any cognizance of their proceedings. He has a right to regard their corporate funds as set apart for his debt, and to impeach any act which would defeat that right, and no lapse of time would defeat him which would not defeat any other suit. The situation of the stockholder is entirely different. He has, by charter, access to all the proceedings of the directors—they are acting for him. If he looks to his own interest, as a prudent man ought, he knows all their important transactions, and has his vote in changing them. In the management of a bank, and especially in a new country among inexperienced men, and more especially in times of such embarrassment as those of 1818, 1819, 1820, and 1821, there is great difficulty, great uncertainty, what is the most judicious policy; and the results, either for good or evil, may disappoint the best judges. It is cruel, it is wicked, to judge always by the issue. In the clamor that has been raised against the old banks, and spread until it has become a popular hobby for some, and a watchword for many, the best names of the country have often been blended with the worst —the honest man abused with the knave; and to connect a man with a broken bank has been regarded sufficient to blight his character, not only in a popular election, but before a court of justice. The extreme difficulties of the times are forgotten; and curses are heaped upon honest men in Cincinnati, for evils occasioned by the general government, or the policy of the nations of Europe. A stockholder who looks on passively at the time, conscious of the difficulties under which his directors labor, sanctioning their policy by his silence, and by his renewed votes for the same men, comes into equity with a bad grace, after the difficulties have all passed out of the memory of man, to take advantage of the prejudice occasioned by unfortunate results, to subject them to heavy penalties, for measures against which he opened not his mouth at the time.

But to return; if the directors are agents of the stockholders the common principle of law and common sense applies—the principal is bound promptly to disavow the unauthorized acts

*of his agent; and, if he acquiesces in them after being [200 informed of them, or being so situated, that, with ordinary attention, he would know them, he thereby ratifies him.

In Breden *v.* Dubary, 14 Sergeant & Rawle, 27, it is said by Gibson, Justice, in giving the opinion of the court: "I take it to be indisputable, that a principal, who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own."

This was an unauthorized transaction by an agent, in relation to sale of goods; no notice in fact appeared to the principal, but the notice was inferred from the presumption that the agent would keep him advised of his proceedings and he had kept silent not more than three months.

Clark's Ex'rs *v.* Van Reimsdyke, 9 Cranch, 158, is decided on the same doctrine, and refers to the effect of a subsequent employment of the same agent, without complaint of his prior conduct.

So in Frothingham *v.* Haley, 3 Mass. 70, the same principle is laid down, and Parsons, Justice, says: "Cobb gave the defendants notice of the enlarged acceptance, who made no objection to it, and appeared satisfied with the conduct of the agent. This fact is conclusive, for it is equivalent to a precedent authority."

If this be the rule of law in relation to an ordinary agency, how forcibly does it apply to the present case! Taylor was not only notified of the order, but refused to make a transfer in payment of a debt which could be paid in the paper of the bank, while he requested to make the transfer to pay an eastern debt. He made no objections, but stood quietly by, evidently relying on the stock as being the better speculation, and calculating on the gain in the value of the stock to result from the reduction of the capital. Can he be allowed, in a court of equity, thus to take advantage of his own wrong? To stand still, and see such a multitude of arrangements made by his agents, such extensive interests of third persons involved, and these becoming so changed that they can never be replaced, opening not his mouth, but watching in covert like the cat for its prey, ready to pounce this way or that, as the speculation shall ultimately appear most promising; and then, *nine years* afterward, come into *this court* for such relief? If the owner of property stands by in silence, and sees another expending money to purchase or improve it, although no agent

201] of his be concerned in the matter, equity will *stop him, by affirmative decree, from setting up his title. Here Taylor comes himself, setting up his own acquiescence, and asking for profits of it; and that, too, against the acts of his own agents, never before objected to. Any man of business, even with the lax system of ethics which common traffic allows, would break out in execrations against one, who should attempt to disavow the acts of an agent, done and relied upon under his own eye; and does the complainant expect less regard to conscience and good faith in this court? It can not be necessary to follow up his argument. Taylor should have filed his bill promptly, even before the transfers were made, if in his power, and then he might ask the court to inquire into the validity and fairness of them. But *now* at *this day*, with the facts as they stand on the answer and the testimony, it is truly a *bold enterprise*. This court will show it little favor.

The statute of limitations is also relied upon, and is a bar so far as the claim is analogous to an action on the case for misconduct or to a suit to compel the refunding of money. Under one of these heads the claim must be included; but it can not be necessary to spend time on this point.

Again, as the case now stands, it is an attempt, on the part of the complainant, to *set aside contracts already completed*. Courts never set aside contracts, except upon proof of actual fraud. 5 Ohio, 472.

There is a material distinction between enforcing and setting aside a contract.

It can not be contended that there is any actual fraud. All the answers deny it in the most positive manner, and the testimony shows most conclusively, the fairness of the intention of all the parties concerned.

But again, the complainant is inconsistent with himself. Either the shares transferred by the stockholders were legal and valid transfers, or they were not. They are either binding on the complainant or they are not. If they were not binding, upon what principle is it that the complainant claims to charge the defendant, Barr, with the purchase of a part of these very shares which he now says did not become the property of the company by the transfers? He alleges Barr purchased six hundred shares, paid for them, and then resold them to the company. These shares are a part of the shares transferred by the other defendants. It will be

seen by an examination of Mr. Spencer's deposition, that the shares numbered from 1846 to 1870, 2196 to 2220, 2289 to *2310, [202 2735 to 2759, 2817 to 2854, 2958 to 2985, and from 4064 to 4099, amounting to two hundred and thirty-five shares, were all transferred by stockholders in payment of debts. So that the complainant is claiming under what he calls a fraudulent contract, and against it—he is claiming to confirm and disaffirm the same transaction; and the same inconsistency is carried into the prayer of the bill, for he prays, "that those who have transferred stock, may be compelled to resume the same and pay their debts, and that William Barr pay the fifty-nine thousand dollars, and *receive* his stock therefor." *Quære:* Does there not appear to be some fraud prayed for in this bill? It is difficult to conceive how the complainant can get clear of being charged with a confirmation of the bargain.

But what kind of relief is the complainant to have, if he is entitled to any? If it is only to set aside the transfers of stock, it will do him no good, except so far as it will leave the corporation at liberty to sue the debtors for the debts which were satisfied by the transfers; for surely it will not be pretended that in this suit the complainant can obtain a judgment in his own name, for the debts due by the parties. He can not be permitted to take the entire control out of the hands of the directors. If he had called upon the directors and requested them to bring the suit, and they had refused, he might perhaps come into equity; but he can not sue until he has first requested the directors to sue. To permit him to do this, is a virtual dissolution of the corporation. It is taking the business out of the control of the directors, and placing it in that of a single stockholder. 3 Paige's Ch. 232, 233.

Fox, for Barr:

In the present state of the case, the question is presented to the court, whether, in the first place, any legal or equitable contract ever existed by which Barr and the other persons who applied to purchase ever owned or became entitled to these shares of stock. I contend that if the directors had power at that time to sell, that they made no such contract; nothing took place between Barr and the officers but a mere proposition, which was not binding or obligatory upon any one until the action of the board of directors was had upon the subject.

This appears to have been the understanding of the officers, otherwise they would have entered the names of the purchasers on their stock books. They would have required the persons 203] *applying to *subscribe* for the stock, according to the directions of the charter, it they had considered the proposition as closed.

Again, to construe this application into a binding contract is to presume the officers intended to disregard the resolutions under which they professed to act, and upon which the validity of their acts depended. It is expressly required by the resolutions of May 3, 1814, that the officers "shall take memorandums of applications, and lay them before the directors for their approbation."

But whatever might have been the understanding or intention of the officers, it is very clear that if their intention was not carried into effect, there can be no legal obligation.

The question then arises, how and in what manner could an individual become a *stockholder* in the Miami Exporting Company?

Section 1 of the charter provides that the then present stockholders of the Miami Exporting Company, together with those who should hereafter become stockholders, in manner thereinafter directed, should be incorporated, etc. Section 3 provides that it shall be lawful for any person to *subscribe* for one or more shares, until the company is complete, the capital or joint stock of which shall *not exceed one thousand shares*, of one hundred dollars each, unless by the assent of a majority of stockholders—five dollars to be paid at the time of *subscribing*, and forty-five dollars between the time of *subscribing* and the 1st of March then next. By section 10, it is provided that shares shall be transferable by assignment on the books of the company. Section 14 provides that every person who shall *subscribe* for a share or shares, after payment shall have been made by a former *subscriber*, shall be charged with such an advance as shall render their payments equal to those of former subscribers. The last section provides for receiving *subscriptions*, and that the *subscription* papers shall be delivered over to the president and directors of the company.

In the resolutions of May 3, 1814, provision is made as to the number of new shares each new *subscriber* shall be entitled to, in proportion to the number of shares held. It is also provided in these resolutions, that each new subscriber (not then a share-

holder), at the time of *subscribing*, shall pay, etc., and no individual shall be permitted to *subscribe* for more than *twenty-five shares in one day, etc.*

*It is clear, therefore, that before any person can become [204 the legal owner of stock in this company, he must *subscribe for it.* Until he has subscribed, the stock is not his, nor is he liable to pay for it.

The meaning of the term, *subscriber*, in these corporations, is settled to be one who has subscribed his name. It is one who has stipulated to take and pay for the stock, not one who has merely made a part payment. Angell on Corporations, 292; 3 Mass. 389.

In the Thames Tunnel Co. *v.* Sheldon, 5 Barn. & Cress. 341, the defendant had been one of the shareholders, and had paid for a great portion of his stock. The number of shares taken was written on the subscription paper, and a blank left for his name to be written, but he had omitted to sign his name; the court held he was no *subscriber*, in the legal sense of the term, and was not liable for any subsequent calls.

The same principle was recognized in the Bristol and Taunton Navigation Canal Co. *v.* Amos, Maule & Sel. 569, in which case the plaintiffs were nonsuited, because the original paper *subscribed* by the defendant was not stamped.

The same principle is recognized in 7 Barn. & Cress. 341.

In Gray *v.* Portland Bank, 3 Mass. 386, an action brought against the bank for not permitting the plaintiff to subscribe, it was contended the plaintiff had a right to recover damages equal to the dividends declared; but the court held, that although he was entitled to have subscribed, and was wrongfully prevented from subscribing, yet he was not a stockholder until he had subscribed and obtained his certificate. They held that the registry of ownership the bank kept, was the only evidence they had a right to resort to for the purpose of proving ownership.

In Jenkins *v.* Union Turnpike Co., 1 Caine's Cases in Error, 93, where the commissioners authorized to receive subscribers were, by the terms of the act, authorized to receive subscriptions, and were authorized to receive at the time of subscribing ten dollars on each share, it was held that a party who had subscribed, but had not paid the ten dollars, was not a stockholder, and therefore not liable to the corporation for subsequent calls.

Again, there could be no binding contract on the part of the company, unless the same was made by the agent of the company. The directors were expressly prohibited from creating 205] *new stock, or increasing the capital, without the assent of a majority of the stockholders. The stockholders have only delegated to the directors a special power, viz: to create as many new shares of the stock as they may think necessary to supply the demands, and to sell them on such terms, etc., *until the 1st day of November next.* I suppose it is perfectly clear that the directors could not sell, nor authorize a share to be sold, after November 1, 1814. To sanction such sales would be to violate the charter. The stockholders only have the power to direct stock to be disposed of; have the right to stipulate in what way, at *what time*, and at what price the sales shall be made.

But supposing the directors had the power to sell after November 1, 1814, have they delegated to the president or cashier power to sell or merely power to receive proposals? I contend they never authorized the president or cashier to make a binding sale of stock without the application was first approved of by the board. The language used, requiring the officers to "take memorandum of applications, and *lay them before the directors for their approval,*" can have no sensible meaning attached to it, unless you allow their approval or disapproval to have some effect. If the contract was binding without approval, why submit the application for approval? Did the board intend to set themselves up to be laughed at? According to the construction contended for on the opposite side, the contract was first to be made, and then, if the directors approved of it, well; if they disaprove of it, it was good, notwithstanding their disapproval.

I take it to be clear, then, that the president or cashier was not clothed with power to make a binding sale of a share of stock.

The court can not sustain this transaction as a complete and binding bargain, without sustaining the following positions, viz:

1. That the president and cashier were authorized to sell and transfer, when the resolutions merely authorized them to receive proposals.

2. That an authority to sell until November 1, 1814, is an authority unlimited as to time.

3. That authority to sell not more than twenty-five shares

on one day, is an authority to sell an unlimited number on any day.

*4. That an authority to sell and receive not more than [206 fifty dollars on a share, authorizes a sale and receipt of one hundred dollars on each share.

5. That although agents are authorized to sell, they are not competent to decide whether a proposition has ripened into a contract or not.

If, then, these officers had no authority given them to contract for the sale of stock, it is perfectly clear there could be no valid sale, whether stock was subscribed for or not. Angell on Corp. 304.

This question is expressly decided in Essex Turnpike Corporation v. Collins, 8 Mass. 298. In this case, Foster had obtained defendant's subscription.

Judge Sedgwick remarks: "It is certain that to every valid contract there must be parties. Aggregate corporations can not contract without vote, because there is no other way in which they can express their assent. Such corporations may contract by their agent, but such agents must have authority given them for that purpose. In this case, no such authority was given to Mr. Foster."

And although certificates of membership had been tendered, it was held the subscription was void for the want of authority in the person to receive the subscription.

I do not contend, because it is not necessary in this case, that the company, as a company, might not have confirmed the transaction, and thus have completed the contract.

One thing is certain, the company could only ratify the bargain by some corporate act. There is no pretense that the company attempted to affirm this transaction; on the contrary, they disaffirmed it. 8 Mass. 298.

Supposing the proposition established, that no valid contract was made for the purchase of stock, the right of Barr to receive back the money deposited with Oliver is unquestionable. The company had no right to receive it of Oliver, and never did, in fact, receive it. But if the leaving it in the possession of Oliver should be considered a deposit of it with the company, it is well settled that a person paying money on a contract for stock is en-

titled to recover the money back, in case the stock is withheld. 3 Mass. 389.

In this case, the judge refers to a case in 20 Vern. Abr. 5, pl. 15, S. S. Comang *v.* Carson, in which the cashier had received money for a subscription, but did not enter the name of respondent
207] *in the book. It was held the person could recover his money back, although he could not be considered one of the company.

But supposing the complainant had a right to have set aside the order to restore the money, when ought he to exercise that right? Is he to lay by for years, and then be permitted to come into a court of equity to set aside the transaction? As a stockholder, he had, by his vote of May 3, 1814, specially authorized the directors to act as his agent to sell and dispose of the stock. Suppose he could, after this, be permitted to come into court and question the acts of his agents, he certainly must present himself on the first opportunity to disaffirm the acts of his agents. He is not permitted to delay and speculate upon chances. He must act promptly in the matter. This question is so fully discussed on the general argument, that I merely mention the objection, and beg the court to examine that branch of the argument, and apply it to this case.

Again, on what principle is it that one stockholder has a right to insist on adding six hundred new shares to the capital, against the consent of the other stockholders? I insist that all the stockholders are interested and necessary parties to the suit.

Upon the whole case, I can discover no foundation for the allegation that Barr was the legal owner of the stock said to be sold on May 21, 1821. There is not sufficient evidence to lay a foundation for a specific performance of an agreement. A court of equity is not in the practice of decreeing a specific performance of a contract for chattels. But should it be attempted to be placed on the ground of an application for a specific performance of a contract, the court could not sustain the claim; for I take it to be a well-settled rule of the court not to afford relief in cases where the value of the property had materially varied between the time of sale and the application to carry the contract into effect.

The complainant, however, is not authorized to come into court upon that ground, at all events not until he shall have called upon

the directors to attend to the business. The president and directors are the only authorized agents of the stockholders, and it is only in case of a fraudulent refusal to discharge their duties that an individual stockholder can come into this court. 3 Paige, 232.

*To permit a stockholder to substitute himself for the [208 corporation, in prosecuted suits, is to dissolve the corporation.

The charter provides that the company shall sue and be sued in their corporate name; that the control and management of the funds and property of the corporation shall be under the sole management of the board of trustees; and yet, without the least suggestion of there being any unjustifiable refusal on the part of the present directors to institute a suit to try the validity of any supposed agreement, the complainant undertakes to litigate matters which affect the whole of the stockholders. If the corporation exists, the charter must be obeyed. The law of the society is completely nullified, if the complainant can interfere in the control and management of the concerns of the company. This is all the nullifiers ask—they do not claim to dissolve the union, but they claim to control the union. They venerate the constitution of the union, but claim that a sovereign state has the right to disregard it. I can perceive no difference in principle between the two cases.

It is said, and probably will be said, that the object of Barr and the other purchasers was to have the apparent ownership of the stock, so as to control the election of directors; and that as their object was unfair, they ought to be compelled to suffer the consequence. Admitting the charge, the conclusion does not follow. I admit that if a legal and valid contract had been made, and Barr had applied to have the contract rescinded, the court could have looked into all the circumstances, and have refused their aid to Barr and the other purchasers, if they perceived they had been attempting to overreach. But that is not the case before the court. The complainant is asking the aid of a court of equity to establish and make a contract, which he admits, by coming into this court, is not a legal one. But the court can not compel a man to become a stockholder, merely because his motives for attempting to become interested were not pure. There must be an agreement binding upon the parties, a contract which in equity and good conscience is valid, although informally executed. A court of equity may direct a contract to be executed, but it can not make

a contract for the parties. A court of equity executes a contract; a court of law can only award damages for not executing it.

But I do not perceive anything immoral or improper in the attempt made to counteract the proceedings of Piatt. The other stockholders had cause to feel alarmed at the prospect of 209] *such a man as Piatt obtaining the control of the institution. That it would have been advantageous to John H. Piatt to have the control of the Miami Bank, all will admit. That the stockholders felt a great anxiety to prevent his obtaining that control, is manifest from the large majority of votes given for the directors named in the ticket opposed to Piatt, and among these votes we find the agent of complainant conspicuous. All his votes were given for the directors opposed to Piatt's directory.

There is no foundation for the surmise and allegation that the directors elected on May 21, 1821, had any expectation of being benefited in the way of transferring stock for payment of debts; for it is a fact that there was not a single share of stock transferred in payment of debts after the 22d, under the resolution of the 8th of May. There were but few shares transferred after the 22d, and those that were transferred were under special resolutions of the board in the particular case. Not one of the new directors ever transferred a single share. They, therefore, could not have had the motive imputed to them.

But supposing that the complainant is entitled to relief, as against Major Barr, what relief is he entitled to? Can he make Major Barr take the whole six hundred shares, or only the one hundred? The complainant's counsel does not inform us the extent which he wishes relief to be granted. I suppose, however, he only asks that Major Barr be compelled to take his one hundred shares, inasmuch as neither Griffin, Perry, Sterret, Patterson, nor Riddle are made defendants. If the complainant wishes to affect more than Barr's one hundred shares, there is clearly a want of parties.

HAMMOND, contra, in reply:

To the branch of the case that embraces William Barr we shall first direct our reply.

The allegation against Barr is, that in May, 1821, on the eve of an election for directors, he purchased six hundred shares of stock, in his own name and in the names of five other persons;

that he paid for the stock; that it was voted upon; that the persons in whose names it was purchased were elected directors, and that they made an order to rescind the purchase and to return to Barr his money. The prayer of the bill on this point is, that the six hundred shares of stock may be set up, and that Barr account for the purchase money.

*The defense set up is two-fold: that the purchase was not [210 a legal and obligatory one—that the transaction was had in good faith, and for an honest purpose.

In support of the first proposition, the answer and the argument of counsel proceed upon the hypothesis that, in making the purchase, the forms required by the by-laws were not pursued. The point of the whole is, that the stock purchased by Barr was not legally *subscribed* for, and the term *subscribed* is the pivot upon which the proposition is made to turn.

As to a part of the stock in question, the facts do not sustain the argument, even in its own terms. Of the stock taken in the name of Barr, thirty-six shares had been formerly owned by individuals. The same was the case with respect to sixty-three shares taken in the name of Riddle, and of all the shares taken in the name of Perry. This is fully explained in Spencer's deposition.

The assumption that the stock taken by Barr must be *subscribed* for according to the regulations of the company and of the board of directors, is a second error of the respondent's argument. These regulations, as quoted, refer to *subscriptions* to be made by the then existing stockholders, and are limited in their operation to a portion of the stock, to a particular class of purchasers, and to a specified period of time. The purchase of Barr had no reference to these regulations; it was made as for existing stock, and the whole purchase money was paid. Spencer testifies that the stock was the property of the bank; that it was sold as such, paid for, and voted upon.

The vote of the shareholders of May 2, 1814, authorized the directors to create new shares, and to sell them on such terms as they might deem most advantageous to the stockholders until the first day of November ensuing. Under this vote, three thousand new shares were created, and one thousand five hundred of them put into market. The residue remained the property of the bank, and as such appears to have been sold by its officers as other stock owned by it. Such was evidently the understanding of all the

parties when the sale in question was made, for no distinction was attempted between the two descriptions of stock. In this view of the case it is not enough for the respondent to show that the sale could not legally be made under one particular regulation for making sales. He must show that there was no regulation or practice of the bank that allowed it; otherwise the court must pre-
211] sume that the *sale was regular. A different presumption would involve a charge of fraud of deeper dye than that which the complainant seeks to establish: nothing less than a combination between Barr and those of the then directors who acted with him, and the officers of the bank, to secure the election of a board of directors by the use of fictitious stock, nominally created for the occasion. And here is presented what seems to me a decisive answer to the entire first branch of the respondent's defense.

He purchased the stock, paid for it, and voted upon it, to effect a particular object. That object effected, those who acted with him unite with him to rescind the purchase. Can he be permitted to defend himself against a just responsibility, by setting up and proving that the whole transaction was fictitious and illegal, and consequently fraudulent? Can he bring forward his own turpitude, and that of his compeers, and use it as a shield to protect and defend himself against what would otherwise be a legal liability? I apprehend this can not be permitted. The face of fairness with which it is attempted, serves only to show to what extent these bank transactions blunt the moral perceptions of those entangled in them.

The second branch of the defense serves further to illustrate the moral obtuseness upon which the first is predicated. It amounts simply to this—that the object to be effected sanctifies the means employed to effect it. To prevent the direction of the bank falling into the hands of J. H. Piatt, it is an act of good faith to fabricate six hundred shares of stock, and vote upon it. This, conceding the first ground of defense to be made out, is the sum total of the second. It can require no further exposure.

Of the question of time, it is only necessary to say here, that there is not a scintilla of proof in the case that the complainant knew anything of the transaction one week before the suit was commenced. In another place, the question of time must be touched upon more at large.

The bill, as to the other defendants, claims to set up certain

shares of stock which they had been permitted to withdraw, or to extinguish, under two distinct resolutions of the board of directors. The first of these was adopted September 22, 1818, in these words:

"*Resolved*, That the officers of this institution be, and they are hereby authorized to receive bank stock of this company, at par, in payment of debts."

*The second, adopted May 8, 1821, is in these words: [212

"*Resolved*, That the stockholders be, and they are hereby authorized to transfer to this bank an amount not exceeding one-half of their stock in said institution, at par, in payment of their regular accommodation notes, excluding all judgments, bills of exchange, and other transactions of a special nature in the bank."

The first of these resolutions remained in force until August 31, 1819, when it was rescinded. The second remained in force only about two weeks. Under the first, the bill claims that one hundred thousand seven hundred and seventy-six dollars and thirty-one cents was withdrawn; and under the second, that forty-six thousand one hundred and nine dollars and ninety-six cents was withdrawn. The answer of the bank states a different sum, but that is immaterial in a general view of the case.

In defense of these two resolutions, and of the transactions under them, various grounds are taken by different defendants, some of which are very inconsistent with others. Indeed, it is difficult to class them so as to preserve them from collision. I shall examine them as stated in the answers and in the argument. First, of the answers; and of them, that of the bank first. It is alleged that in September, 1818, the directors believed the stock to be worth par; that the directors believed they had power to pass the resolution; that its object was to promote the interest of the stockholders:

1. By a cheap collection of a large amount of debts.

2. To insure the payment of debts from certain stockholders, who had no other means.

3. By collecting a larger amount of debts than could be collected by any other mode.

4. By increasing the dividends of the remaining stockholders.

And it is urged that the stockholders sanctioned the measure by their acquiescence and the re-election of the directors that adopted it. Further, it is alleged that all the transfers made were

in good faith and for a valuable consideration, that is, for debts due to the bank.

The resolution of May 8, 1821, appears to have been adopted with the same views, and under the belief that the stock was "*not greatly depreciated in value*," and that the remaining half would be sufficient to cover "*their proportion of losses which might be sustained by the company.*" Such is the story of the bank.

The next party most largely interested, who has answered, is Thomas D. Carneal. He separates his case entirely from that 213] *made by the bank. His first position is, that the increase of the stock, under the resolution of the stockholders of May 3, 1814, is illegal and void. The charter, he alleges, authorized the employment of only five hundred thousand dollars, three hundred thousand of which was then subscribed. That under the resolution of May, 1814, the stock was increased to six hundred thousand dollars, and he alleges that the whole additional three hundred thousand dollars were in fact sold by October 1, 1814. He then sets forth the regulations of the directors for the sale of the fifteen hundred shares of the new stock, and impeaches the sale of the stock owned by the complainant as being illegal and void, except as to seventy-four shares of the stock subscribed before the increase of May, 1814. The grounds of making this stock void are, first, that it was subscribed in the names of others, in violation of the rules and regulations for its sale; and second, that its numbers show it to be of stock above the amount of five hundred thousand dollars.

He then proceeds to aver the honest intention of his transfers the right of the bank to receive them, the value of the stock; and charges that the stockholders who retained their stock might have sold it, but retained it with a view to the profit.

Next he introduces a resolution of the board of directors, of May 8, 1808, in these words:

"*Resolved*, That the directors may, at any time, when they conceive it to be the interest of the company, receive stock or shares of this company in payment of debts due to them."

He shows that some certain transfers took place under this resolution, to a small amount, and alleges that the great injury to the company was the illegal increase of stock, and an excessive declaration of dividends. The amount of dividends received by complainant, at different times, is set out, and it is claimed that for so much

of these dividends as were declared upon the unauthorized stock held by the complainant, he ought to be made account; calls for proof that the complainant owned any stock when the suit was commenced, and objects that the complainant has acquiesced too long to be now permitted to question any of the transactions referred to.

These three answers, it is believed, cover pretty much the whole grounds of defense set up by all the defendants. It will be noted that the foundation of Barr's defense is, that the six hundred shares of stock purchased by him, in May, 1821, had *never been [214 sold, and never constituted any portion of the capital stock of the bank. Whilst the main position taken by Carneal is, that the whole six hundred shares of stock were sold as early as October, 1814, and that one hundred and twenty-six of those shares held by Taylor, being an excess beyond the capital stock allowed by the charter, are of no account whatever. The two answers containing these contradictory propositions, appear to have been prepared, as they certainly are subscribed, by the same counselor.

It will be noted that Carneal, in his answer, asserts that Taylor should be made account for the dividends received upon these one hundred and twenty-six shares—twelve thousand six hundred dollars—and objects that Taylor's acquiescence precludes him from relief. Whilst the counsel who subscribes this answer, in his argument for Barr, strongly maintains that, if the sale of the stock be void, and money be paid upon it, he is entitled to recover it back. If Carneal be right as to the one hundred and twenty-six shares of stock, and the counsel for Barr be right in his position, the bank owes Taylor twelve thousand six hundred dollars, with interest, except the dividends, which he may justly claim to set off against his debt to them.

If Carneal be correct, in the position that acquiescence precludes inquiry, the proposition protects Taylor as well as himself. An adjustment he would no doubt be very glad to make.

I shall now proceed to examine the case upon its general merits as embraced in the answers and arguments for the respondents. And I premise that, in the arguments at least, there is much of labor and research that does not touch what the counsel for the complainants conceive to be the real and true question. We do not controvert the right of the bank to purchase and sell its own stock, as a commodity in the market; nor to receive pledges of it in security

for debts; nor, under proper circumstances, to receive it in payment of debts. All the arguments used, and authorities cited upon these points, might have been safely omitted. The proposition maintained for the complainant is a plain and unambiguous one. It is this: the resolutions of September, 1818, and of May, 1821, were not adopted for the purpose of authorizing the bank to deal in its own stock, as a commodity in the market, but specially to enable stockholder debtors to liquidate their claims by withdraw-
215] ing *their stock. The power to do this—its fairness—its justice—we deny.

The right to buy and sell its own stock, *bona fide*, in market, if paid for in money, with a view to be sold for money, is not a right that we call in question. We do not say that any resolution is necessary to enable a bank to do this. But to permit a stockholder to become indebted to the bank and then to apply his stock to the payment of his debts, is a very different matter. Even this, we admit, may be done under proper circumstances, in a particular case. The resolution of May, 1808, proceeds upon the correct principle, and extends as far as it can be allowed to proceed: "*The directors may at any time, when they conceive it to be the interest of the company, receive stock or shares of this company, in payment of debts due them.*"

This resolution covers all the ground that the authorities cited for the different respondents cover. It remains in force, and was not understood, by the parties concerned, to embrace the cases of the resolutions of September, 1818, and May, 1821. What, then, was the object of these latter resolutions? Take those assigned by the bank itself:

To collect debts due the company cheaply.

To collect debts from those who had no other means to pay.

To make large collections of debts.

To increase dividends on the remaining stock.

Which one of the cases cited by any or all of the counsel for the defendants embraces any such proposition as is here stated? Take them separate or together, and they avow a resolution to reduce the stock.

A great deal is said, in argument, about the unquestionable power of the president and directors to manage the stock and funds of the company. Agreed. But does an authority to manage stock

and funds include a power to destroy or extinguish them? I should think that to state the question is to resolve it.

It was doubtless a cheap and effective mode of collecting debts; but how did it profit "*the remaining stockholders?*" What effect had it on the debts of stockholders of doubtful credit? The by-laws secured to the company a lien on the stock for the debts of stockholders. Some doubt is suggested as to the validity of this by-law. There is no pretense that it has ever been adjudged that such by-laws are invalid. The doubt of Chief Justice Parker, 6 Pick. 329, is adduced upon this point. But that doubt is evidently predicated upon the erroneous assumption *that, in that case, [216 it was "*a first attempt.*" The validity of such a by-law evidently was not doubted by the bank in question. It is presumed this court can not doubt it.

In September, 1818, the bank was largely indebted. In November following, it suspended specie payments. The debts liquidated by stock was one of the means of paying its own indebtedness. How could it profit the "*remaining stockholders*" to withdraw one hundred thousand dollars of the means of paying the company debts, and thus cast the payment of these debts upon a reduced number and upon a reduced amount of means? How could the withdrawal increase the dividends of the "*remainder?*" The debts of the institution were not reduced, but the means of discharging them were. I should like to see the proposition stated in figures, that, leaving the debts the same, makes more profit to four hundred thousand dollars capital and six hundred thousand dollars credit, than to five hundred thousand dollars capital and seven hundred thousand dollars credit. The conclusion seems inevitable that the reasons now assigned for these measures are mere after-thoughts. They could not have operated at the time the transaction took place.

But there was honesty of intention in the whole. There was no actual fraudulent intent, and the proceedings can not be held fraudulent *per se.* Is this a tenable position? A bank is in a tottering condition; a resolution is adopted, under which a given number of stockholders grab up the stock they have invested in exchange for the debts they owe; thus realizing the full value of their stock, disincumbering themselves of their indebtedness, and casting a total loss upon their company stockholders. Our position is, that the law does not permit this—that it is a fraud *per se,* in all concerned in it.

It is stated in many of the answers, and proof is produced in support of it, that at the time of all these transfers, stock was estimated at its PAR VALUE in the market. In respect to the sales under the resolution of 1821, the answer of the bank does not venture quite so far. But admit the fact; what follows? Obviously, that these withdrawals of stock and debts destroyed the value of the "*remaining*" stock, and consequently demonstrates the wrong done to the complainant, and his right to have the whole restored, at the same PAR VALUE at which it was disposed of.

There remains, however, one point of defense, in which all the defendants concur. The complainant has remained so long quies-
217] cent, that he is considered as having assented to, ratified, *and confirm the transactions complained of. This argument, in brief, is thus stated: The directors are the agents of the stockholders, consequently the agents of the complainant; the matters complained of were transacted in 1818, and in 1821, by these agents; the complainant did not promptly disavow them; his failure to do so is to be considered a confirmation.

In support of this position sundry authorities are quoted. 14 Serg. & R. 27; 9 Cranch, 158; 3 Mass. 70. All these cases relate to "*an ordinary agency.*" They relate to an agency where third persons are to be affected; that is, persons holding no relation to the same agent. But do they bear upon a case like this? The president and directors were the common agents of the complainant and of the respondents. The respondents are bound to know that the agent transcended his authority. If the act be illegal, they are parties to it. The doctrine of the implied ratification, having for its object the protection of third persons, who are in no respect parties, can have no application to a case where a common agent has transcended his authority, whereby one portion of his common employers have gained advantage over another. Can this position be doubted?

It is objected that the delay in demanding the restitution of this stock and these debts is necessarily prejudicial to the interests of the respondents, that deaths and insolvencies have taken place. Cases are stated: that of N. Wright; what is in it? The Perrys bought his stock for cash, and transferred it to the bank to pay their debt. We presume all who transferrred, bought and paid for the stock. The case of William Oliver; he became indebted for *depreciated* paper. No doubt he passed it on the community

for value received, and others lost by its increased depreciation. To repay it, "*he sold a valuable lot to get the stock.*" Verily! Then it was more convenient, more advantageous to the debtor to pay in "*stock*" than in lots, or in the *depreciated* paper of the bank; so that it would seem the stock was more a drug than "*depreciated paper.*" A hopeful concession in support of the evidence and the argument that the stock was of *par value.* What is the hardship of Oliver's case? He obtained depreciated paper and put it in circulation—upon some speculation, we may well presume. To repay the amount, he sold a lot for stock—upon a second speculation, we may again presume. It would be a hardship to deprive him of the profits of these speculations! He made them on the faith of an "*agreement with the bank to take the stock.*" Comment can not be necessary.

*The remedy sought by the complainant involves no diffi- [218
culty or injustice. It is asked that each stockholder separately restore to the bank the stock he has withdrawn. When it is thus restored, the parties may proceed to bank upon it, or to distribute it upon the whole stock, equalize the entire loss, and divide what remains among the stockholders, according to such equalization.

The statute of limitations is relied upon. We agree with the counsel who states the fact, that it can not be necessary to dwell upon this point. If the transactions complained of are untainted with fraud, the complainant can have no relief; if so tainted, the statute of limitations presents no bar.

Chief Justice COLLETT delivered the opinion of the court:

The complainant contends that the defendants who transferred stock to the bank in payment of their debts, under the resolution of September, 1818, or of May, 1821, and who were solvent at the time they made the transfers, were unauthorized to do so; that the directors, by the charter, were not authorized to receive stock of solvent persons in payment of their debts, because it was a withdrawal of so much of the capital stock of the company. He also contends that the transfers were permitted and made fraudulently; that the purchase of the six hundred shares of stock by Barr and his return of it to the bank were fraudulent; that, by the withdrawal, he took from the company so much of its capital stock, which the directors could not authorize.

As to the authority of the directors to receive the stock of the company in payment of the debts of the stockholders. This company was incorporated on April 15, 1803, its charter to continue until May 1, 1843. The ostensible object of those who obtained the charter, was to purchase the agricultural and manufactured products of the country, and to transport them to foreign markets; hence the name, "Miami Exporting Company." Section 6 of the charter authorizes the appointment of agents and the making of shipments. By section 8, the company is required to vest in produce and manufactures at least one-half of the cash received on shipments. Their real object was banking; and the directors were, by the charter, designedly given most extensive powers over the funds of the company, so as to authorize them to employ the 219] whole in business other than that apparently intended *as the sole object of the incorporation. By section 5 of the charter, it is provided that the president and directors shall open and continue their office in the town of Cincinnati, "and shall have the *sole management of the funds.*" By section 6, the president and directors are authorized "to dispose of the funds of the company in such manner as they shall think most advantageous to the company." The directors are here undoubtedly authorized to cease merchandising, and to dispose of the funds of the company in banking, in discounting notes and bills of exchange, if they think it "most advantageous." They are as undoubtedly authorized to dispose of their funds, and to employ their agents in buying and selling the stocks of other corporations, if they think this "most advantageous." It appears from the testimony in the case, that they were at one time largely and profitably employed in buying and selling the stock of the Bank of the United States. If they could so vest their funds, why have they not power to buy and sell their own stock, if they "think it most advantageous to the company?" We think they have such power; and having it, they may fix the price, the mode of purchase, and of payment. They can purchase at auction, by private sale, for cash, or notes, or other property, or on credit; or can take it in payment of debts due from stockholders, whether solvent or insolvent. To take it of solvent stockholders in payment of debts, might be more advantageous to the company than to pay for it in cash or good bills. We do not see that a purchase must necessarily be fraudulent, or that a purchase in any of these modes is necessarily

a withdrawal of so much of the capital stock of the bank. When it is transferred to the bank, it becomes the property of the bank, of the remaining stockholders in proportion to their individual stock, to be managed for them by the directors, as the other stock. It is there for creditors, as much so as before the transfer; the capital stock is not lessened. On a division of the profits, the dividends which would have been assigned to the owner of the stock, had he not transferred, would be assigned to the bank, and held as other corporate property by the stockholders who had not transferred. Whether this is done by calculating the dividend on the whole stock of the bank, and then dividing the sum set apart for the stock assigned to the bank, among the holders of stock who had not transferred; or whether, by one operation, the whole sum to be paid, in dividends, is divided among those who had not transferred, the result would *be the same. The [220 directors took the first method in apportioning the dividends, as to the stock transferred to the company in 1816, and the last as to the stock transferred under the resolution of 1818. There has been no dividend declared or paid by the bank since the transfers under the resolutions of May, 1821. The last dividend was in April, 1821. O. M. Spencer, president of the company when these resolutions were passed, testifies that the reason for passing the resolution of 1818 was to collect the debts of the bank, to lessen the stock, and thereby increase the dividends of those who did not transfer. The directors, in 1823, when they consolidated the stock, did not notice that owned by the company. The reasons which induced the directors to purchase, or the manner in which they treated or disposed of the stock, can not affect the seller. The transfer neither destroyed nor lessened its value. If the directors, when the transfers were made, charged the amount to the contingent fund, the dividends of the remaining stockholders were immediately increased as much as though the stock had been lessened so much; if not, and it was taken from the current profits of the bank, the first dividends would be diminished, but the subsequent ones increased. If no charge was made to any fund, the stockholders received too great a dividend, and thus withdrew so much of the capital stock. If so, Taylor, who received his dividends as long as any other stockholder, has no reason to complain of those who transferred, if the transfers were made in good faith. The answers all deny that they were fraudulent,

and there is no proof of their being so. The stock was selling at from five to ten per cent. above par in August, 1818. In September after, the bank was embarrassed by its debts, due to the United States Bank; most of the stockholders were indebted to the bank and embarrassed, and many were insolvent. The directors, under these circumstances, resolved to take its own stock, at par, from those indebted to the bank. This resolution was known to the stockholders generally. Taylor himself was informed of it by the president of the bank, and of the reasons for passing it. He then owed to the bank the debt which he now owes; stock was then selling at par. It was nearly four months after, before more than three thousand dollars worth of stock was transferred in payment of debts. If fraud was designed, why did not those who intended it, avail themselves of the opportunity offered to commit it? All the other banks in the city resorted to the same expedient to sus-
221] tain their credit. *The directors who passed the resolutions of 1818 must have been stockholders. Seven of the eleven directors, who constituted the whole board, had been continued in the directory from 1816. Ten of them were re-elected in 1819, and nine in 1820. If the resolution of 1818, and the transfers made under it, had been a fraud on the other stockholders; or if, under the circumstances of the bank, its passage and continuance in force for near a year had manifested even a want of ordinary judgment, so large a proportion of these directors would not have been elected in 1820.

The resolution of 1821 authorized any shareholder to assign half his stock in payment of his accommodation notes. It was repealed two months after its passage. The stock was to be taken at par; it had then fallen below par, but less than the notes of the bank in which these debts were payable. That many who transferred stock were solvent, and by the transfer did better for themselves than those did who retained their stock, is now manifest, but we can not infer from these premises that the transfers were fraudulent. The bank had, years before, imprudently extended its discounts and issues of paper; it had not reserved a sufficient contingent fund, but had probably paid too large dividends; undisclosed frauds may have been practiced. It was failing, and the directors resorted to these expedients to save it. Directors of other banks resorted to the same, but they had not that effect. Events have shown that they were, perhaps, unwise. But it

would now be manifestly unjust to compel those who transferred under these resolutions to take back their stock and pay the debts for which it was transferred, to relieve the stockholders who did not think proper to transfer. The stock has since fallen and our currency become good. These stockholders, as to these shares, have not since had any representation in the directory of the bank. Why did not Taylor transfer? He knew of the resolution of 1818, and he then owed the debt to the bank for which he is now pressed. He probably believed that the bank, by the measures it was taking, would be able to declare large dividends; to resell the stock it was taking in at an advance, and that therefore it would be better for him not to transfer. In 1820 he voted for nine of the eleven directors who passed the resolution of 1818.

When it has turned out that those who transferred their stock in payment of their debts have done better by disposing of it than he has by retaining his and not paying his debt, *would it [222 not be palpably unjust to set aside these transfers for his relief, on a bill filed in 1828, nine years after they were made and had come to his knowledge? A principal who knows of a transaction of his agent, in which he exceeds his authority, and does not promptly disavow it, can not afterward do so, because it would injure unjustly him with whom the agent dealt. This is no arbitrary principle, confined to one class of agents or cases. It applies wherever injustice would be done without it. If a man sees a stranger selling his property, and does not set up his claim, the title passes to the purchaser. The directors, when dealing with one of their own body, or any other stockholder (which is an every-day occurrence in all banks), are the agents of the stockholders as a body. The stockholder, in such a transaction, stands as a stranger to the corporation, and is subject to the same liabilities, and is undoubtedly entitled to the benefit of every principle of law or equity for his protection against the injustice of the corporation, or any of its members, of which a stranger could avail himself.

As to the six hundred shares purchased by Barr of the president and cashier of the bank, on the day before the election of directors in May, 1821, and relinquished on the 5th of June next after, one hundred and sixty-three of these shares were of old stock, transferred to the bank under the resolutions of 1818 and 1821. We have just decided that the directors had the right to purchase their own stock whenever they thought it would be beneficial to

the bank; if so, they undoubtedly had a right to rescind an unexecuted contract to sell, and to return the purchase money with the consent of the purchaser. The certificates for the stock had not been delivered.

Thirty-four of the new shares sold to Barr did not belong to the bank at the time of the sale; they had been before sold; the sale to him of these shares was therefore void. The other new shares were sold to Barr by the president and cashier without any other authority from the directors than that contained in the resolution of May 3, 1814. By that resolution, a sale made by the officers was required to be submitted to the directors for their confirmation. No entry of this sale had been made in the books of the bank; no certificates had issued. The directors, it seems to us, had a right to set aside this sale; it was contrary to the policy which appears to have been pursued by the directors from the passage of the resolution of 1818, to buy and not to 223] sell stock. The resolution of May, 1821, to *receive stock in payment of debts, had been passed but a few days before, and was then in force. How, then, could the president and cashier make a sale and expect an approval? The bank had before sold more than five hundred thousand dollars worth of stock, to which sum it is claimed its capital stock was limited by the charter. If this was the case, it was the duty of the directors to disaffirm the sale. If they have done thus, can the court set it up?

Riddle had nothing to do with this transaction. He did not vote the one hundred shares purchased in his name. Barr, Sterret, Perry, and Griffin were in the directory, composed of eleven members. The other seven directors are not to be presumed to have acted fraudulently when the purchase was rescinded, because four or five of the board were interested. Directors of all banks are called upon from day to day to decide upon the cases of their co-directors. But independent of this, these shares were taken by Barr, to be voted on the next day for directors of the bank, against the John H. Piatt ticket. Barr, Griffin, Patterson, Sterret, and Perry voted five hundred of these shares for all the directors who were elected. The lowest on this ticket had a majority over the highest in the opposition of more than five hundred votes, so that the directors elected were the same that would have been elected had none of these shares been voted. Afterward, the shares were

relinquished, and the money paid upon them received back by Barr, so that the bank was in precisely the same situation it would have been had not this transaction taken place. The directors were the same, the stock the same, in the same hands, of the same value. Who, then, did it injure? How did it affect Taylor? If all the directors, and even Riddle, who would not vote his shares, were concerned with Barr in this transaction to affect the election (of which there is no evidence), they had their labor in vain. They neither benefited themselves nor injured others. If a person had lost by such a transaction, he would be entitled to redress; no one would desire to gain. This affair, so far as Barr is concerned, is not to be commended, but censured. If it should be punished, this is not the place. A court of chancery gives relief to the injured only, if plain and adequate redress can nowhere else be obtained; and it gives it merely to the extent of the injury.

Upon the whole, the court are unanimously of opinion that the bill should be dismissed as to the corporation and the defendants *who transferred stock to the bank in payment of debts; [224 and a majority of the court are of opinion that it should be dismissed also as to Barr.

Judge WRIGHT:

I concur with my brethren in the points just decided, as to all the defendants but Barr. As to him, my mind does not yield its assent to the proposition decided by the majority of the court. I think the case in proof clearly shows, that in the purchase and withdrawal of the six hundred shares of the stock by Barr, there was fraud to give this court jurisdiction of the matter, and that common justice imposes upon us an obligation to take from the actor the resulting benefits, the retention of which injures his co-corporators. To my mind, the assumption, that inasmuch as the purchase of this stock was fraudulent, the subsequent fraudulent withdrawal of the money paid for it, restores the parties to the situation they occupied before the fraud was practiced, and so takes away the right to relief, looks more to form than to the real nature of the transaction. Does the first fraud so neutralize the second as to destroy its power to injure? Does the fact, that the first act of fraud failed of its object, authorize the failing party to engage in another act equally fraudulent, freed from responsibility

for the injury it occasions? We all agree that the whole transaction was tainted with fraud. That being the case, I can not imagine how the fact that no injury resulted from the purchase of the stock and paying *into the coffers of the bank sixty thousand dollars*, can justify and sustain the *fraudulent withdrawal of the like sum*, and throwing the loss of it upon his fellow-corporators. The fraud which injured the corporation, in my view of the case, was the withdrawing of the sixty-thousand dollars capital, crippling its means, and involving the stockholders in the entire loss. To remedy this, I feel called upon to compel him to repay this money into bank, and to retake the stock he surrendered.

225] *DAVIS LESSEE v. LIVINGSTON.

Grant of administration is not the commencement of a suit, within the provisions of a statutory saving clause of actions and suits pending.

THIS case was adjourned here for decision, from the county of Butler. It was decided upon a single point, and only so much of the case is reported as is necessary to understand that point.

It was an action of ejectment, brought by heirs at law, to recover lands of which their ancestors died seized. At the trial, the material facts were agreed. The ownership of the ancestor, the possession at the time of his death, and the heirship of the plaintiff's lessors, were admitted. The character of the defendant's title was also admitted. On March 11, 1803, the territory constituting the county of Butler comprised part of the county of Hamilton. On that day, letters of administration were granted on the decedent's estate, in Hamilton county. On March 24, 1803, the legislature established the county of Butler, within the boundaries of which the lands in dispute lay. On May 9, 1804, the court of common pleas of the county of Hamilton, at the request of the administrators, made an order for the sale of the decedent's real estate, for the payment of his debts. In August, 1804, a sale was effected and a conveyance made. The defendant claimed under this sale.

At the trial, the defendant offered this grant of administration, order of sale, with proof of the sale and the conveyance, in evidence. The plaintiff's counsel objected to receiving them; but they were admitted, and consequently a verdict rendered for the defendant. A motion was made for a new trial by the plaintiff, on the ground of error in admitting this evidence. The determination of this motion was reserved for decision here.

DUNLEVY, for the motion.

J. WOODS, against it.

Judge WOOD delivered the opinion of the court:

It is claimed by the defendant's counsel, that the granting of administration on the 10th of March, thirteen days before the counties were divided, was the commencement of a "*suit* or **cause*," [226 which was pending at the time of said division; and that the subsequent order and sale of the lands in Butler, by the direction of the court of common pleas of Hamilton, comes within the saving clause of the statute.

In the case of Ludlow's Heirs *v.* Wade, 5 Ohio, 504, this *identical* question was presented on an order of the orphans' court, issued for the sale of the lands of an intestate, and this court decided that such an order *issued*, was not a suit or prosecution pending within the saving clause of the statute of 1805.

In the case of the Heirs of Ludlow *v.* McBride, 3 Ohio, 259, this court have also determined, that under the law of 1795, for settling estates in the orphans' court, that court could not direct the sale of lands by administrators, unless they lay in the same county where the court sat.

In reviewing these cases, they appear to us to settle the questions presented, as far as they can be settled by this court. We are fully of the opinion that the grant of administration is not a *suit* or *cause*, within the saving clause of the act referred to, and that the court of common pleas in Hamilton could not legally direct the sale of lands in Butler, by administrators, in 1804; that such order, and all the subsequent proceedings had upon it, are *illegal* and *void;* that the deed from the administrators could convey no title when founded on such order, and that the court erred in receiving evi-

dence of such proceedings, and such deed to go to the jury, to prove title in the defendant.

A new trial must be granted, with costs, to abide the event.

227] *B. M. PIATT *v.* ST. CLAIR'S HEIRS, BANK OF THE UNITED STATES, AND OTHERS.

A judgment creditor may resort to chancery to subject the effects of his debtor beyond the reach of execution at law, before he takes out execution on his judgment, if it appear that the debtor has not effects to satisfy the judgment, or the effects are connected with equities or trusts, or involve a variety of interests, so that adequate remedy can not be had at law.

Upon a *sci. fa.* on a mortgage, where the mortgagor, to show *payment*, exhibits evidence of his dealings, and also of a judgment in his name against the mortgagee, and the jury find the *payment* and a balance due to the mortgagor, the judgment offered in evidence is not merged in the judgment for the defendant, upon the *sci. fa.* on the mortgage, or extinguished, but stands as a judgment, to the extent of the balance remaining due the mortgagor.

A juror may be a witness, to relate what claims of a party were allowed by a jury, under a plea of payment.

An agreement with some of several defendants to make no defense to the suit, and let the property of a co-defendant be sold, if not carried into execution, will not affect the complainant's real rights.

The right to proceed by *sci. fa.* to charge decedent's lands in the hands of heirs, no longer exists. Such land must be converted into personalty by the administrator to pay debts. The heir and his alienee hold the lands descended discharged of the ancestor's debts, if the creditor do not assert his claim within five years after the administration account is settled.

Lands, at the death of ancestor, descend to the heir, and are his, charged with the ancestor's debts, until the representative of the personal estate of the deceased proceed to convert them into money to pay the debts.

The heir, in such case, is bound to pay the taxes, and if he suffer them to accumulate and the lands to be sold, become himself the purchaser, and have them conveyed to his guardian, or to another, *in trust*, the estate, as to creditors of the deceased, is not changed.

A sale of land by administrator, for debts, to a trustee, to place it beyond the reach of creditors, under an agreement or understanding that he should hold it for the benefit of the heirs and such debts as the parties might agree, is fraudulent and void.

A trustee of a fund in which several parties are interested has no right to make any agreement to advance the interest of one of the parties at the expense of another of them, even if confirmed by the court; the court will be held to have confirmed the act inadvertently.

An administrator has no power to create a *trust*. If a minor can, he is then chargeable with fraud, as adult. A sale by an heir is good, but the purchaser takes subject to the debts of the ancestor.

Persons dealing with heirs for lands are chargeable with knowledge of the extent of their rights.

Where there are several tracts of land descended, and some have been aliened by the heir, equity will compel a creditor to seek his debt: 1. Of that unaliened; and 2. To proceed back upon that aliened in regular order, beginning with that last aliened.

When one has a lien upon two funds, and another a posterior lien upon only one of them, the one having both liens will be compelled first to exhaust the subject of his exclusive lien, and permitted only to resort to the other for the deficiency.

In cases of decedents' estates, where the administrator is before the court, equity will so shape the proceedings as to settle the estate.

THIS case was decided by Chief Justice COLLETT and Judge WRIGHT, on the circuit, at the county of Butler, in May, 1833. It had been elaborately argued and investigated in bank, in December, 1832, but was sent back to Hamilton county to make an additional party. The case is fully stated in the opinion *of [223 the court. The arguments are too voluminous to be inserted.

CASWELL, HAMMOND, and STARR, for the complainant.

N. WRIGHT, V. WORTHINGTON, E. KING, and C. FOX, for the respondents.

Judge WRIGHT delivered the opinion of the court:

The complainant, claiming to be a judgment creditor of the estate of St. Clair, upon which execution has been issued and been returned *nulla bona*, prays this court to charge his demand upon certain real estate which was of the intestate, now in the hands of the defendants. Voluminous matters are set forth in the bill, answer, exhibits, and evidence, many of which, in the estimation of the court, have no material bearing upon the real controversy before it. I will not, therefore, state the allegations of the bill and answers in detail, but content myself with giving a statement of

the material facts of the case, as the court understand them to be made out upon the papers, the documentary evidence and testimony on file.

The complainant with his brother, now deceased, shortly before St. Clair's death, in September, 1820, entered into an agreement with him, by which they undertook to satisfy certain liabilities of St. Clair to the Farmers and Mechanics' Bank of Cincinnati, then about to be transferred to the Bank of the United States, and for the sum so satisfied, the Piatts were to have credit upon a mortgage, held by St. Clair against them, then amounting to about eleven thousand dollars; and for the residue, they were to be paid in land on Main street, in Cincinnati, at seventy-five dollars a foot. In pursuance of this agreement, the Piatts satisfied for the said St. Clair the sum of twenty-three thousand eight hundred and seventy-five dollars and forty-nine cents, and took a transfer to themselves of the liabilities of St. Clair. This arrangement with the bank was not fully completed until about October 14, 1820, a few days after St. Clair's death.

St. Clair died suddenly, intestate, in September, 1820. Administration on the estate was granted to William Lytle, in March, 1821. The administrator did not pay the claim of the Piatts, but admitted a part of it as a general claim upon the estate, and confessed judgment for the amount, in favor of the Farmers and Mechanics' Bank, *for the use of Piatts*, May 10, 1821, for seventeen thousand seven hundred and forty-one dollars and twelve and 229] one-half cents, supposing thereby, that *he secured to himself the privilege of paying it in the notes of that bank.

When St. Clair died, the taxes upon his real estate were unpaid for the years 1819 and 1820. The administrator paid these taxes, and those for 1821, but having no faith in the validity of tax sales, and finding it inconvenient to raise money to pay the taxes for 1822, suffered them to remain unpaid, expecting that no sale would take place, and that the tax would lie until another year. Contrary to his expectation, the lands were brought to sale for taxes, and bidders attended. Arthur St. Clair, jr., one of the children and heir, then a few months over nineteen years old, attended the sale without any intention of bidding, but being advised to bid, and assured of pecuniary aid, he did, on December 24, 1822, buy in the estate at the tax sale. By his consent, the collector's deed was made to Jones, his guardian, on May 24, 1823

The administrator did not consider this sale as extinguishing the lien of creditors.

On February 26, 1822, the administrator, representing the personal assets as insufficient to pay the demands against the estate, applied to the probate court, according to law, for an order to sell the real estate of the intestate. Upon this application, an appraisement was made in March, 1822, though not returned to the court and confirmed until March 17, 1823, on which day a sale was ordered, returnable on August 19, 1823.

On June 11, 1823, Jones, guardian, at the request of A. St. Clair, his ward, conveyed the estate to Joseph S. Benham, in trust for the *heirs of St. Clair*. Two days after this, Arthur St. Clair, jr., filed a bill to quiet the title to these lands, in the name of Benham, the pendency of which he caused to be advertised in the newspapers. This bill was afterward dismissed.

On June 20, 1823, the administrator took out the order of court, for the sale of the estate, advertised the sale on the 23d of the same month, in the same paper with the notice of the *quia timet* bill, in the name of Benham. The sale took place on August 6, 1823. In the written conditions of this sale, the administrator set forth a number of liens upon the estate, subject to which the purchaser of him would take. Amongst these, were Benham's claim, under the tax sale to Jones, and the Piatt claim, "under an alleged contract" with St. *Clair, before his decease. The [230 terms of sale were payment in four equal installments, in nine, fifteen, twenty, and twenty-four months, with interest from the sale, upon satisfactory security. At this sale, the estate was struck off to Arthur St. Clair, jr., who wanted a few days of being twenty years of age. He paid no money, nor gave any security. The administrator returned the sale to the court, without naming the purchaser, and it was confirmed August 19, 1823, by the court, without its being shown to whom the sale was made.

On November 12, 1823, Lytle, in his capacity as administrator, in conjunction with young St. Clair, conveyed the estate to Joseph S. Benham, as trustee, "*without interest in, or responsibility for the lands*," to hold to him or his successors, assigns, or grantees, in trust, to pay the purchase money, and of "liquidating such claims against the estate of A. St. Clair, as the parties to the deed might see fit and expedient." Amongst other things, this deed recites, that young St. Clair was "desirous of securing to himself and co-

heirs the ultimate resulting proceeds" of the land, "after paying the purchase money, and satisfying such claims as all the parties to the deed may agree upon." It provides for the distribution of the residue of the proceeds, equally amongst the children of St. Clair, or the division of land amongst them, as might be convenient. Benham took both these trusts out of sympathy and regard for the St. Clair family.

Some time prior to this sale, a negotiation had been opened by the administrator, with the Bank of the United States, one of the creditors of St. Clair's estate, having in view the liquidation of her claim, by the conveyance of a portion of the lands of the estate held under Benham's conveyance from Jones. On November 13, 1823, one day subsequent to the deed from the administrator to Benham, the Bank of the United States adopted a resolution, in these words: "*Resolved*, That if the legal representatives of Arthur St. Clair, deceased, convey to the president, directors, and company of the Bank of the United States, by a clear, undisputed, and unincumbered title to the satisfaction of George W. Jones, the lots designated in the draft exhibited by Henry Avery, and described in the 'article for adjusting,' etc., forwarded by George W. Jones, together with the lots marked in the same draft, Nos. 35 and 32, then the agent is authorized to make an advance to the family of Arthur St. Clair of five hundred dollars; to advance 231] for the *payment of taxes belonging to that estate a sum not exceeding three hundred dollars; to give to the said representatives a check on the Miami Exporting Company for the sum of two thousand dollars, and to execute a release of all claims by the bank on said estate." Under the authority of this resolution, after its receipt in Cincinnati, Jones, as agent of the bank, completed the arrangement with the administrator; took from Benham a conveyance of the lots, on December 8, 1823, and executed a release to the administrator and heirs of that date. At that time, the bank had the control of a mortgage upon St. Clair to the Miami Exporting Company, of June 29, 1820, on out-lot No. 23, for fourteen thousand five hundred and eighty-four dollars; another, dated March 6, 1820, given to the Cincinnati College, upon out-lot No. 34, for four thousand dollars, and a judgment entered in the Hamilton common pleas, February 24, 1820, for twelve thousand four hundred and thirteen dollars and fifty-five cents, and other claims against the estate, amounting to nine thousand

two hundred and thirty-four dollars and nine cents. These several claims, with interest, at that time amounted to about thirty-six thousand three hundred and twenty-eight dollars and thirty-eight cents, exclusive of advances made for taxes and to the widow and heirs. The bank, at that time, held the paper of Lytle, the administrator, on which St. Clair was security, to the amount, principal and interest, of seventy-nine thousand eight hundred and fifty-eight dollars and eighty-five cents, and held the estate liable on a small note of one Sinks, amounting, principal and interest, to two hundred and ninety-seven dollars and eighty-seven cents.

Piatt filed a bill in chancery against the representatives of St. Clair, praying for a specific performance of the contract made with St. Clair in September, 1820, for the lot on Main street, which was dismissed.

In August, 1824, the administrator not having credited anything to Piatt on the mortgage, or paid him anything on account of the judgment, brought a *sci. fa.* upon the mortgage against him, to which he set up as a defense *payment* under the contract of September, 1820; and on trial in May, 1824, he gave in evidence to the jury the contract aforesaid, and the whole amount of claims paid under it (including the note embraced in the payment in his favor), against the administrator, and obtained a verdict of the jury that the defendant was "entitled to have so much of the matter set off by his plea, arising under an agreement made with Arthur St. Clair in his lifetime, as is equal to the amount due upon the mortgage, in the writ of *scire facias* mentioned, set off against the same, which mortgage money amounts to ten thousand eight hundred and seventy-two dollars and twenty-four cents on October 14, 1820, leaving a balance due to the defendant May 20, 1828, of twenty thousand one hundred and thirteen dollars and forty-one and three-fourths cents, besides costs."

*Martin, one of the jurors, testifies that the jury allowed [232 Piatt's entire claim, which consisted of various notes, one or two accounts, and a judgment, and gave him a verdict for twenty thousand dollars.

There is some uncertainty attending the transaction between Piatt and the administrator. The arrangement with the bank by which the Piatts acquired St. Clair's paper was completed as early as October 14, 1820. The amount at that time is conceded to have been twenty-three thousand eight hundred and seventy-five dol-

lars and forty-nine cents. The mortgage money then amounted to ten thousand eight hundred and seventy-two dollars and twenty-four cents, which would leave due from the estate to Piatt at that date thirteen thousand and three dollars and twenty-five cents. The judgment against the administrator of May 10, 1821, was for the sum of seventeen thousand seven hundred and forty dollars and seventy-seven and one-half cents, besides costs.

It does not appear that any part of the sum due from St. Clair's estate to Piatt was ever paid by the administrator or the heirs, though it is testified by Kirby that in behalf of General Lytle he once called on Piatt, and offered to convey to him, in satisfaction of his claim, a lot on Vine street, a part of the premises held by Benham. This offer was refused, because the lot was remote and of but little value.

The out-lots in Cincinnati which were conveyed to Benham were subdivided into four or more squares of small building lots, and sold from time to time under the direction of the trustee, the heirs, and their guardians. And many claims against the estate of St. Clair were liquidated by the conveyance of portions of this estate as subdivided; and Benham, the trustee, conveyed some thirty or forty different lots in the subdivision for the satisfaction of such claims between the date of the deed to him and the year 1828. Many of these lots have been resold, and passed through various hands. Much of the estate has been enhanced in value by improvements.

Lytle, the administrator, died in 1831, without having settled up his administration account. The greater proportion of the disbursements he made were of the proceeds of sales of portions of the trust property.

From the month of June, 1827, down to March, 1832, the heirs of St. Clair made numerous conveyances of portions of the trust property included in Benham's deed, and by him subdivided, the consideration for which conveyances, expressed in the deeds, amounts to upward of forty-one thousand dollars.

In 1831 partition was made among the heirs of St. Clair of the 233] then remaining portions of said real estate, and each *one's portion thereof was allotted in severalty. Some of this estate still remains in said heirs.

The conveyance to Benham in trust, and by him to his various grantees, has been recognized and confirmed by repeated acts of

the administrator and adult heirs, and the guardians of the minor heirs, and the estate divided by the partition is still held under the conveyance of Benham.

There can be little doubt but the arrangement with Benham was made with the assent of Lytle, the administrator, and the other persons concerned, with the intention to place the real estate of the intestate in a situation to be managed for the benefit of the heirs, and to use it advantageously for them to discharge the demands against the estate. In this no fraud was intended by the administrator and the others concerned. The measures were prosecuted with good feeling for the children, without intention of injury to creditors, and without any distinct impression that the injury would result to them. Such things are frequently done; and it is quite probable that the proceedings in this case saved this estate from actual insolvency.

Besides the claim of the complainant, there are still some other claims upon the estate outstanding and unpaid.

The first question arising in the case is, whether the complainant shows himself a judgment creditor, entitled to come into this court for relief?

Lytle, the administrator, confessed a judgment in favor of the complainant as early as 1821, one month after he was appointed. By the chancery act, judgment creditors, where the debtor has not sufficient effects subject to levy to satisfy the execution, may proceed in chancery to subject the effects of the debtor, in the hands of any person to the payment of the judgment. 29 Ohio L. 84. The chancery act of 1824 gave to judgment creditors the same power, but restrained them from proceeding in this court, in some cases, until after the execution had issued and been returned at law. 22 Ohio L. 85–88. The jurisdiction of the court may be sustained upon either of these laws, on the case made, if the judgment remains in force, or upon general principles, because the case is so connected with trusts and equities, and involves such a variety of interests that plain and adequate remedy can not be had at law.

But it is urged that the judgment of Piatt having been set off in satisfaction of the suit on the mortgage, no longer exists, but is merged in that proceeding. It appears that upon the *scire* **facias* against Piatt, on the mortgage, the defendant re- [234 lied upon the plea of payment. To sustain this plea, he proved to the satisfaction of the jury the original contract with St. Clair,

to take up his notes in the Farmers and Mechanics' Bank, and exhibited the notes so taken up, an account, and also the judgment in evidence. The jury found that the sum of ten thousand eight hundred and seventy-two dollars and twenty-four cents was due on that mortgage on October 14, 1820, when the agreement was consummated, and that so much of the sum due to Piatt from the estate, as was equal to that sum, was a payment of it. This was a substantial finding of the plea of payment for the defendant, upon which there was judgment for him. Does this operate to extinguish the judgment which the complainant obtained years before against the administrator? The act under which the *scire facias* was prosecuted, 22 Ohio L. 232, only authorized the defendant to avoid the award of execution by showing payment, or satisfaction, or some other *legal* bar. The statute of offsets did not allow the *pleading* a set-off in bar, but only to make offsets available in certain actions upon notice. 22 Ohio L. 101. This law was not considered applicable to the proceeding by *scire facias* on a mortgage, and of consequence was inapplicable to the case against the present complainant. Such was the judgment of the court. One of the jurors has been examined as a witness as to what was offered in evidence before the jury, to prove the payment. His evidence is objected to by the respondents as incompetent to prove what is of *record*. If the objection is good, there is no evidence to show the judgment of the complainant was used on that trial at all; and of course it stands available to him, in this case, for the whole amount. But we see no valid objection to his testimony as to what constituted the *payment or satisfaction* of the mortgage, upon which the jury found their verdict. He proves that Piatt, on that issue, gave in evidence *various notes*, one or two *accounts*, and *a judgment;* that the jury allowed all the claims, and found a verdict for Piatt of twenty thousand one hundred and thirteen dollars and forty-one and three-fourth cents. The utmost the respondents can ask from this testimony is, that *the judgment* given in evidence shall be holden by the court as the *same* described in the bill. We so take it. A recurrence to the date, the amount of that judgment, the sum admitted to have been paid for St. Clair by the Piatts, and the sum due on the mortgage in October, 1820, will furnish grounds from which the amount due when the verdict was 235] found may be *ascertained to be near what the juror swears it was, say nineteen thousand one hundred and seventy-nine dol-

lars and eighty-six cents. The judgment, with the interest calculated up to the time of the trial, would amount to the sum of twenty-five thousand one hundred and ninety-one dollars and eighty-five cents. It was necessary to prove the judgment to the jury in order to explain the whole transaction; but what was absorbed by the verdict will depend upon the sum due in October, 1820. If that sum, independent of the judgment, exceeded the ten thousand eight hundred and seventy-two dollars and twenty-four cents, then due on the mortgage, the balance would remain a debt against the estate, and if that sum, at the date of the judgment, did not amount to more, then the judgment would remain in full force for its entire amount. If it amounted to less, the judgment would have to be reduced to the true amount by the proper credit. If more, the excess would remain, in its original shape, a claim against the estate. The conceded amount settled by the Piatts at the Farmers and Mechanics' Bank is twenty-three thousand eight hundred and seventy-five dollars and forty-nine cents. The ten thousand eight hundred and seventy-two dollars and twenty-four cents due on the mortgage, deducted from this, leaves thirteen thousand three dollars and twenty-five cents. This, with interest from October, 1820, to May, 1821, the date of the judgment, would amount to thirteen thousand four hundred and sixty-two dollars and fifty-five cents, yet the judgment was *confessed* for seventeen thousand seven hundred and forty dollars seventy-seven and a half cents, more by four thousand seven hundred and eighty-eight dollars and twenty-two cents; what this excess was for, we can not certainly ascertain, nor is it easy to make out clearly what is now due the complainant. The administrator, in his statement to the court in 1826, puts this claim down at thirty-two thousand dollars. In the agreement signed by Piatt and heirs, it is estimated at twenty thousand one hundred and thirteen dollars and forty-one cents on May 20, 1828.

The amount of Piatt's claim on October 14, 1820, was	$23,875	49
The mortgage of the same date	10,872	24
Left due Piatt	$13,003	25
Interest on this balance to May 2, 1833	9,789	50
Balance due Piatt then	$22,792	75
To which add costs and interest on the two judgments,	121	22
Sum due Piatt, May 2, 1833	$22,913	97

In this state of the case we do not feel warranted in saying that the judgment is satisfied and inoperative. It seems satisfactorily made out that the complainant does sustain the relation of a judgment creditor to the estate of St. Clair. His execution can not be 236] satisfied at law. The personal assets are exhausted. *The real estate has been passed into the hands of a trustee, subdivided and sold out, and is now colorably held discharged of the lien of the creditors of the intestate. In such a state of case chancery will afford redress unless the complainant has done some act to deprive himself of its aid.

It is objected to the complainant's right that since this suit was commenced he has entered into the agreement of May, 1831, which had a fraudulent object as it regards the Bank of the United States, one of the defendants, and that he is so affected by this fraud that the chancery will afford him no relief, but leave him to his legal remedy. As to this, it will be sufficient to observe that the testimony shows that this paper was executed by the complainant and the heirs under the expectation that the bank would accede to it. But the bank having refused its sanction to the proposed measure, it has not since been esteemed valid amongst the parties to it. This objection therefore fails.†

†Memorandum of an agreement made between Arthur St. Clair, John St. Clair, Eliza St. Clair, of full age; Francis M. St. Clair, Margaret Belfour St. Clair, Laura St. Clair, minors, by their guardians, heirs of St. Clair, deceased, on the one part, and George Wallace and Daniel Gano, as securities for D. Shepherd, Benjamin M. Piatt, survivor of John H. Piatt, deceased, and Richard Fosdick, on the second part:

Whereas, the Bank of the United States holds a large and valuable real estate, which was of the late Arthur St. Clair, deceased, which the said bank received in payment of certain debts against said estate, amounting, as is supposed, to the sum stated in the schedule below; and whereas it is considered that the proceedings by virtue of which they (the bank) became the holders of said real estate are void, or voidable, and irregular, especially that the said arrangement was so made as to secure to said bank the whole amount of her debt, to the exclusion of the other creditors aforesaid; and whereas it is supposed that the real estate aforesaid is sufficient in fact to pay all the debts held by the said bank, as aforesaid, against said estate, and all the other debts enumerated, and as specified in the schedule below: Therefore, for the purpose of a just and fair settlement of said debts of said estate, it is agreed by the said heirs and the said creditors, as follows, to wit: The real estate held by said bank aforesaid shall be decreed to be sold by the court, either in the suit now pending, or such other suit as shall be brought; and Samuel Lewis, on

*Section 27 of the judgment and execution law of Feb- [237
ruary 4, 1824, 22 Ohio L. 118, allows judgment creditors, after the time allowed by law for executors and administrators to settle their accounts, to proceed by *scire facias* to charge the judgment

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the part of the creditors, and E. S. Haines, on the part of the heirs, shall, by consent of the court, be appointed special masters for the purpose of subdividing and selling to the best advantage said real estate, the proceeds of which shall be applied to the payment of the debts against the estate, as follows: 1. The debts due to the bank, and the other debts aforesaid, to be paid, if from said proceeds there be funds sufficient to pay the same; and the residue of the funds, after paying said debts and expenses, to be divided and paid over to the said heirs, according to law. It is agreed that no defense whatever shall be set up to the debts aforesaid, and no hindrance, either on the part of the administrator or the heirs of said St. Clair, to the most speedy settlement of the said debts of said estate, according to this agreement; and it is further agreed that no other property of said estate shall be resorted to for the payment of said debts. But if the said property so held by said bank shall prove insufficient, then the loss to be sustained by the creditors aforesaid, in proportion to their several claims aforesaid. The defenses put in, in the suit now pending, are to be withdrawn.

It is also understood that Charles Vattier has a claim against said estate which is contested, and is supposed to be without foundation; which claim, if recovered against said estate, is to be admitted to a *pro rata* dividend with the creditors above enumerated; provided, however, that no greater sum shall be admitted to a distribution than what will, with the debts above enumerated, amount in all to ten thousand dollars, besides the Piatt debts.

In witness whereof, the parties have hereunto set their hands, this 14th day of May, A. D. 1831.

JOHN ST. CLAIR, *for myself and Arthur St. Clair, and Eliza St. Clair, and as guardian for Margaret B. St Clair and Laura St. Clair.*

CHARLES FOX, *guardian for Francis M. St. Clair.*

BENJAMIN M. PIATT, *survivor, etc.*

SCHEDULE OF THE DEBTS TAKEN INTO VIEW IN THIS AGREEMENT.

Claim of George Wallace, April 8, 1824			$2,253 45
D. Shepherd			1,100 00
Fosdick, January 20, 1820			202 81
Benjamin M. Piatt, May 30, 1828			20,113 41
Claims of Bank of United States:			
September 25, 1820	$12,422 00		
May 11, 1821	8,107 90		
June 29, 1820	14,587 00		
March 6, 1820	4,000 00		
December 8, 1823	2,250 00		
Taxes	350 00		
			$41,716 90

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upon the lands of decedents, held at their death. The administration laws give to the executors and administrator authority, on application to the probate court, and on its order, to sell these lands to pay debts. The act concerning executors and administrators, passed March 12, 1831, 29 Ohio L. 240, repeals the clause of the act of 1824, allowing the *scire facias* against heirs, and limits the lien of the creditor upon the lands of the decedent to five years from the decease, if the estate is settled up with the probate court; or if not settled, to the time of five years after the estate shall be settled. After such limitation, lands are held by the heir, or his alienee discharged of the lien, though the heir is liable, for any claim against the estate, to the full extent of the assets received from the estate. At no period, we believe, in this state, have the lands of a decedent been free from the incumbrance of his debts, in default of personal assets; and we believe the representatives of the personalty have always had power, in some proceeding in the probate court, to convert, by sale, the lands necessary to pay debts into personalty, for distribution among creditors. We are of opinion that the proceeding by *scire facias*, by the creditor, did not, at any time, exclude the jurisdiction of this court. The policy of our law of descents and distribution has always looked to the equal distribution of intestate's effects, first, 238] among *creditors, and secondly, of the residue, among heirs. The strictly legal proceeding by *scire facias* by the creditor, provided in the act of 1824, in its practical operation, would have defeated an equal distribution, by enabling a diligent creditor, who should first proceed, to make an appropriation of the whole of the lands to himself excluding other creditors. The law prohibited the recovery of costs, if suit was brought against the administrator before the expiration of the time limited for settling the estate; so that creditors, if they brought suit, could recover no costs, and if they did not bring suit, they would be in danger of losing their claims by the superior diligence of some more considerate creditor. Another difficulty, still, would be felt. A great proportion of claims in this state are within the jurisdiction of justices of the peace. On judgments by justices, no *scire facias* could issue, nor would any such judgment authorize the sale of land. The practical operation of such a system would be, first, a partial appropriation of decedents' effects among creditors; and second, to give a decided preference to the holders of large claims with the juris-

diction of courts of record over the holders of smaller claims within a justice's jurisdiction We can not think this was the intention of the general assembly, or that in passing these laws, it was intended to take from this court the power of proceeding, in such cases, where one suit would settle the whole estate, and execute the laws in their spirit of equality and justice.

This brings us to consider whether the sale to Arthur St. Clair for taxes, and by the administrator, were such as to discharge the lands which descended to him and others, from the payment of the debts of their ancestor. At the death of St. Clair, his real estate descended at once to his children as heirs at law, incumbered, it is true, with a liability for his debts; but until actually subjected to the debts by the personal representative, or the creditor, by some judicial proceeding, they were the property of the heirs. The possession was theirs—the rents and profits theirs. They were bound of course to pay the taxes. It would be strange, indeed, if either a court of law or equity should feel compelled to give such effect to the culpable omission of the heir to keep down the taxes, as to enable him, in consequence, to acquire a perfect right to the estate, to the total exclusion of those whose rights he was bound to protect. We look upon the purchase by the heir for taxes as but his own method of paying them. He was bound to pay, and the conveyance *to the heir, or under his direction [239 to his guardian, in no way changes the situation of the estate. The guardian could not purchase up the estate of his ward and acquire any right, except *for* his ward. Whatever, therefore, passed by the sale for taxes accrued to the benefit of the heirs who before held the fee. The conveyance by the guardian to Benham, as trustee, effected no change in the estate, at least so far as it regards creditors. None of the parties at the time regarded these transactions as disincumbering, in fact, the estate from the debts of the intestate. This is conclusively evidenced by the subsequent sale to the same person by the administrator. If, as is contended, the first sale passed the estate from the heirs of St. Clair, what was there for the administrator to sell?

If the sale by the administrator was made in pursuance of an understanding, on his part, to place this estate out of the reach of creditors, for the benefit of the heirs, it was, in legal contemplation, fraudulent and void, however laudable the motives which influenced the act on the part of the administrator. As administra-

tor, he was the legal trustee of the fund, guarding alike the interest of the creditor and heir. He had no legal right to engage in any act tending to advantage one of those for whom he held in trust to the exclusion of another. The return to the probate court and confirmation there imparts to this void act no vitality. The parties to a fraudulent act can not make it available against a stranger to the fraud. The genius of the law opposes itself to all fraud, and the most solemn judicial proceedings, when tinctured with it, are vitiated. 5 Ohio, 294. The sale to the heir, under the circumstances, being of no avail against a creditor, it follows, of course, that the conveyance to Benham, in trust, in performance of that sale, would be of no greater avail. The law conferred upon the administrator no power to create a trust. Conveying in trust, as agent of the minor heir, he could convey no more right or estate than that heir had. If it be conceded that a minor can create a trust estate by directing a third person to convey to a trustee, that will make no difference in this case; because, if the heir were capable of making a contract, he is chargeable with the legal fraud, and can avail himself of no advantage resulting from it. If incapable of making the contract and creating a trust, how can Benham, the trustee, acquire any title? We consider this conveyance, and those made under it, as if made by the heirs themselves. The guardian, administrator, and trustee, 240] in these *conveyances, are the agents of the heirs. The heirs, as such, had an undoubted right to sell the real estate which had descended to them. The purchaser took, subject to the incumbrance of the debts of the ancestor. The extent of the lien of this incumbrance, and the manner of enforcing it, is matter of general law. No one dealing with heirs, for lands cast upon them by descent, can acquire the estate discharged of the incumbrance of the debts because they were ignorant of the law. Ignorance of the law excuses no one; much less will it impart to its possessor the power of acquiring property in land directly contrary to law. This principle would apply to the original conveyances in this case and all the mesne conveyances. No one could trace his title without carrying it back to the decedent, and from him, by descent, to the heir.

It is strenuously argued that the Bank of the United States and the other defendants and alienees were *bona fide* purchasers without notice, and entitled to be protected against the creditor.

Is this true as a fact? Did the bank suppose the legal title in the guardian or trustee? It is declared as a fact, in the evidence printed by the bank and urged in argument, that the bank agent considered the sale void for taxes, and threatened suit; and the guardian, to avoid the vexation of the suit, conveyed to Benham. The bank became the grantee of Benham, the trustee, for a large portion of the estate. With whom were the negotiations for purchase carried on? St. Clair, the minor heir and pretended owner, or his guardian? Benham, the trustee? With neither. The negotiation was opened with the administrator, or his agent, the respondent Avery, before the transfer to Benham or the sale, by the administrator, to St. Clair. After these alleged sales and the conveyances, it was completed; but the case is without a scintilla of evidence going to show any change in the negotiations on account of the sales. Is it possible to believe the agent of the bank completed so large a purchase, after these sales, under the belief in their efficacy to pass the estate from the administrator and creditor, and still continued his negotiations with the administrator, whose interest in the subject had passed entirely away? The agent swears that he had confidence in the soundness of the title and purchase. He claims not to have been ignorant of any fact connected with the title. Knowing these facts, he rests on his confidence in the soundness of the title. The face of the deed to Benham, every paper connected with the title, discloses to the world the *nature of his interest, and the connection of the [241 St. Clair heirs with it. Questions of this kind are determined by known, settled principles—principles well understood and inflexible—principles that can not contract or expand, and will not vary on account of the variety or magnitude of the interests involved. It is urged upon us with much vehemence, that the estate in question is immensely valuable; that large sums have been expended in improving it; and that many persons are now interested. We do not see why these arguments were pressed. Surely no counsel can suppose this court wants firmness to do its duty because great interests are involved and numerous individuals are to be affected; or imagine we had power, in the administration of the law, to consult expediency or policy. With such questions we have nothing to do. As a court, we "can listen only to the mandates of the law; and can tread only that path which is marked out by duty."

Considering, then, as we do, the conveyances to Benham, and all

the mesne conveyances from him, as but the alienation of the heirs and their alienees, there can be no question but all who derived title from that source are legally affected with notice, and take their respective portions of the estate subject to the incumbrance of the intestate's debts. The question now presented is: How will equity enforce the lien of a creditor upon the estate in the hands of the heirs or their alienees? At law, the heir is only liable to the creditor for what he has received of his ancestor by descent, and a jury, upon a *scire facias*, may assess the value of the lands descended. The creditor is limited in his recovery to that amount. Brown *v.* Shuker, 2 Crompton & Jervis, 311; McVickers *v.* Ludlow's Heirs, 2 Ohio, 246; Union Bank of Georgia *v.* Meigs' Heirs, 5 Ohio, 314; 1 Strange, 665; Wolf *v.* Pounsford, 4 Ohio, 397; 1 Penn. 152.

In cases where several distinct tracts of land have descended to the heir, some of which have been aliened by him and some not, equity will so far control the creditor in asserting his lien as to require him to resort, first, to the land remaining in the heir unaliened, and discharge the residue from the lien on payment of the balance due, if the property is more than sufficient for that purpose. It will ascertain the value of the property descended and the amount of the claim upon it. Where justice requires it, we doubt not the power of the court to permit a liquidation of the demand in discharge of the lien, or to impose such conditions upon 242] the sale of the estate as shall do *justice to all having interest in the subject. It seems to us equally clear that the demands of justice can not require, and that a court of equity will not lend its aid to enforce a lien upon a particular tract of land, which has passed into the hands of third persons, until the residue of the estate subject to the lien, which can be conveniently realized, is exhausted. It is a rule of equity, perfectly well established, that where one has a lien upon two funds, and another a posterior lien upon only one of them, the one having both liens will be compelled to assert his claim first upon the subject of his exclusive lien, so that he may be satisfied, if possible, without interfering with the rights of the junior creditor. 1 Hopk. 66, 460; 4 Johns. Ch. 123; 19 Johns. 486; 2 Atk. 446; 1 H. Blk. 159; and Miami Exporting Co. *v.* Bank of the United States and Ruffners, decided at this term. The rule, in our view, is directly applicable to this case. That portion of the real estate of St. Clair which re-

mains unsold is subject to the lien of the creditors of the estate, and to no other lien. That portion aliened by the heirs, either directly or through the intervention of their agent and trustee, Benham, is subject to the same lien, and also to that of the alienee. The application of the obviously just rule referred to requires of the court first to subject the lands to the creditors of the estate, which remain in the hands of the heirs.

It was urged in argument that the claim of the alienees rested on the same foundation with that of the heirs, and if the sale by the administrator was considered invalid, that all the proceedings under it should be disregarded, and the creditor left to assert his lien upon the entire estate descended or upon such portions of it as he should select. Perhaps this position might be true if urged in a court of law on a *scire facias*, but it will not obtain in this court, having the whole subject and all the parties before it, and the power so to shape its proceedings as to attain the ends of justice and settle the whole matter amongst all interested without further litigation. A party asking justice at the hand of this court is always required to do justice, and the court never lends its aid to do an unjust or unequitable act, or one calculated to involve others in vexatious litigation or controversy further than is absolutely necessary.

As there is an administrator of St. Clair's estate party defendant, there will be little difficulty in ascertaining the outstanding claims upon the estate, chargeable upon the realty and so shaping our proceedings as to effect a complete adjustment, *not [243 only of the claim of the complainant, but of all others remaining unpaid. The continuing minority of some of the heirs is no obstacle in the way. A creditor's lien for debts of the ancestor may be enforced against minor as well as adult heirs coming into an estate by descent. The conveyances to and by Benham, the subdivision of the estate by him, the partition among the heirs, are all acts of confirmation of those transfers, and more or less obligatory upon the heirs; perfectly obligatory upon the adult heirs who have done any act of confirmation since they have attained to majority or shown a disposition to acquiesce. But we are not called upon now, in the view we take of the case, to decide the questions amongst the heirs. Questions touching their interests may arise in some future stage of the cause, and if they do they will be then considered.

Upon the whole we consider:

1. That the complainant has an outstanding judgment against the estate of Arthur St. Clair, for which he can have relief in this court, and that there are other outstanding claims against the estate.

2. That the personal assets of the estate have been exhausted.

3. That the purchase of the realty for taxes accrued to the benefit of the heirs and the estate.

4. That the pretended sale of the realty by the administrator is fraudulent and void as against creditors, and that the estate descended upon the children and heirs at law, subject to the payment of the debts, and is still liable for the same.

5. That the estate be charged with the sum necessary to pay the outstanding debts, the costs of the complainant, and the master's further proceeding.

The following decree was entered in the cause:

This cause came on to be heard upon the bill, amended bill, answers, replication, exhibits, and evidence, and the court having seen and read the papers and evidence, and heard the argument of counsel thereon, finds that the complainant recovered a judgment against the administrator of St. Clair, on May 10, 1821, upon which execution has been issued and returned; that there are no goods or chattels of the defendant out of which to make the amount, and that after allowing to the estate of St. Clair credit for the amount of the mortgage money, and all other demands of the estate against the complainant, there is left due the complainant 244] in equity, on May 2, 1823, *including costs and interest, a balance of twenty-two thousand nine hundred and thirteen dollars and ninety-seven cents; that the personal property of the intestate, St. Clair, has been completely exhausted in the payment of debts and expenses by the administrator, leaving the amount due the complainant and other claims unsatisfied; that the real estate described in the bill descended to the heirs at law, subject to the payment of the debts due by their ancestor; that the purchase by A. St. Clair, one of the heirs at law, for arrears of taxes, and the conveyance under said purchase to John T. Jones, guardian for said heir, inured to the benefit of all the heirs of the intestate St. Clair, and left the estate so purchased subject to the debts due by their ancestor. That the subsequent sale of the real estate of the intestate by the administrator to young St. Clair, then a minor,

the conveyance by St. Clair and the administrator to Joseph S. Benham, as trustee, the partition of the premises by the trustee and heirs, and the sale and conveyance thereof since, do not vest in said trustee or his alienees, or the heirs of the estate, the land so conveyed discharged of the debts of said intestate; but the said sale, conveyance, and proceedings, are fraudulent and void as against the rights of creditors to enforce the payment of their debts out of said estate. And the court is of opinion that the law and equity arising upon the facts is with the complainant. But inasmuch as the court is not fully advised of all the facts and details necessary to a final disposition of the whole matters arising, it is ordered and decreed that the cause be referred to Crafts J. Wright, a master commissioner of this court, with instructions to ascertain and state accounts, showing:

1. How much is due from the intestate to other creditors than the complainant, including interest up to May 2, 1833, showing the name of the creditor and the amount of each claim and interest.

2. What land of the intestate descended to his heirs at law, designating what lies in the city of Cincinnati, by the description by which it is known in the subdivisions made by Benham and the heirs.

3. What parcels of said lands are still held in common by the heirs at law.

4. What portions of the land descended have been since aliened by the heirs, or the trustee, or otherwise, specifying the date of the conveyance, the names of the grantors and *grantees, [245 the tract conveyed, and the person holding the same on July 10, 1828, at the filing of the bill in this case.

In the taking of which accounts the said master may examine the documents and evidence on file, and the parties may take other testimony, and may, if necessary, compel the parties or witnesses to produce before him any books or vouchers, or written evidence in their possession or control; and if the sum due the complainant, and those found due to other creditors of the intestate, with the accruing interest, the costs of this suit, and of the master in executing this order, be not paid within sixty days thereafter, into the hands of the master, for those interested, the said master shall, forthwith, after the expiration of said sixty days, proceed to raise the money required to discharge the said claims and costs, by sale of so much of the real estate descended as aforesaid, ac-

cording to the laws of Ohio, regulating sales on execution, as may be necessary to raise said moneys, in the following order, that is to say:

1. Those lands, if any, which the said heirs still hold in common.

2. Those now held by the heirs in severalty, apportioning to each heir the proportion of the same required, and selling so much of each one's share as may be necessary to raise from each so much of his proportion of said sum as shall not be otherwise paid to said master.

3. Those which have been aliened or conveyed by the trustee or heirs since July 10, 1828, or so much of them, beginning with the latest conveyed, as may be necessary to produce the required sum.

4. And if, after the foregoing sales, the sum raised is insufficient to discharge said claims, that then the master report the deficiency to the court, with his proceedings, and the evidence by him taken.

And it is further ordered, that if the parties are dissatisfied with any of the accounts stated and allowed by the master, or his proceedings from time to time in the progress of his acts, and file exceptions, the master shall forbear proceeding to make sale of the premises until the exceptions are disposed of.

And for the coming in of the report and further proceedings the cause is continued.

246] *[*The following case, though decided as on the circuit, was considered and adjudged by all the judges.*]

David Stone *v.* Jacob L. Vance, Abraham Harrison, and Reuben Dove.

A paper purporting to be a receipt, but containing, in truth, a complete contract between the parties to it, can not be explained by parol, as can be mere general receipts for property or money.

The payee of a negotiable note, in a suit between the assignee and the maker, is a competent witness to prove upon what terms the assignment was made, if called to the stand by the maker, their interest being adverse.

A note made and indorsed for the accommodation of the maker, to be discounted at a bank where its discount is refused, can not be transferred as a business note to one having knowledge of the facts, and the amount recovered by the indorser.

THIS cause was heard in the county of Fairfield, and taken under advisement for decision in the county of Franklin. The facts are fully stated in the opinion of the court.

G. SWAN, for plaintiff.

H. H. HUNTER, for defendants.

Judge WOOD delivered the opinion of the court:

This is an action of assumpsit, brought here for decision from the county of Fairfield, founded on a promissory note, executed by the defendants on January 25, 1820, payable to the order of Nathaniel F. Stone, for six hundred dollars, four months after date, at the Franklin Bank of Columbus, and indorsed by the payee to the plaintiff.

The defendant has plead: 1. The general issue. 2. A special plea in bar, setting forth that the note was made by Vance as principal, and by the other defendants as securities for the accommodation of Vancé, and was indorsed by the payee and the plaintiff for the accommodation of Vance, and for the special purpose of discount at the Franklin Bank of Columbus, and was placed in the hands of the payee with that design only; that the note was presented at the bank, and its discount refused; of all which premises the plaintiff had notice. That the plaintiff's name, as an indorser, was then, by the procurement of the plaintiff, and with a fraudulent intent, stricken from the note, and the blank filled with an indorsement over the name of Nathaniel F. Stone, the payee; and the note thus indorsed, delivered to the plaintiff, as the indorsee, without consideration.

If this plea be true, the note has been given a circulation *contrary to the agreement of the parties, differing from the [247 special purpose for which it was executed and delivered, with the full knowledge of the holder, without consideration, and the plaintiff is not entitled to recover. Dennison v. J. L. Bacon et al., 10 Johns. 198. In this case the note was made for the purpose of being discounted at a bank; it was offered and rejected. The court say: "The object of it failed; it should have been returned to the parties who gave it; it was fraudulent in the payees to negotiate it and send it into the world without notice of the agreement under which it was drawn and received. The plaintiff is,

therefore, not entitled to recover." The same principle is also recognized in the case of Woodhull *v.* Holmes, Id. 231.

What, then, is the proof to support this plea? The first in order, for our consideration, is a receipt, executed by the payee to Vance, at the time the note was made and delivered, and which is in the following words: "Received, Dayton, January 6, 1830, of Jacob L. Vance, a note, signed by himself, Abraham Harrison, and Reuben Dove, payable at the Franklin Bank of Columbus, in four months from January, 1830, for six hundred dollars, which note, if discounted at said bank, five hundred dollars is to be applied to said Vance's credit, with the late firm of Stone & Bostwick." Signed, "Nath'l F. Stone."

It is claimed that this paper, executed at the time between the parties, is to be considered as their entire contract, in relation to the note; that it can not be enlarged, restrained, contradicted, nor varied, by parol testimony, of any agreement made *before, or at the time* of its execution, unless there is some latent ambiguity. This is, in our view, a well-settled principle, and one which ought not to be overthrown. The evidence which this paper furnishes, then, in support of the plea, is, that this was an accommodation note, made and delivered for the special purpose of discount at the Franklin Bank of Columbus, and five hundred dollars of the avails to be applied to the credit of Vance, on the books of Stone & Bostwick. So far, this contract can not be misunderstood. If it be said the paper in question is a *receipt*, which the law permits to be explained, the answer is, that this principle only extends to an instrument taken as evidence of the delivery of property, or evidences of property, and not to instruments containing entire contracts between the parties, although the word "*received*" may be used in some part of the contract. It is claimed, however, that 248] *there is no express provision in this contract, what shall be done with the balance of the note, if discounted, or if not, what shall be done with the note itself; that here is an ambiguity which will admit parol testimony, to explain the whole transaction. We think not. Our opinion is, that there is a plain and obvious construction which the law raises from this agreement, and which is as much a part of it as if it were contained within its express provisions. If discounted, say the parties, five hundred dollars shall be applied to Vance's credit; the *balance*, says the law and the plain principles of common honesty and justice, shall be money in the

hands of the payee, for the use of Vance, and paid to him, when required. If not discounted, the law speaks in unequivocal terms, that the note shall be restored to the makers.

In further support of the plea, the defendants' counsel have read the deposition of the payee, to prove that the plaintiff paid no consideration for the note; that he is prosecuting it for the benefit of the payee, and his knowledge of the purpose for which it was given. The deposition, in our view, establishes these facts. The whole field is, therefore, open to inquiry, as much so as if the payee were plaintiff on the record.

It is, however, objected to this deposition that the witness is incompetent from interest. It is a sufficient answer to this objection that the interest of the witness is against the party who calls him. It is objected, again, that a party to negotiable paper can not be called as a witness to impeach its validity. In the case of Woodhull *v.* Holmes, before cited, the court say, "that the indorser of a negotiable note may be called as a witness to prove facts *subsequent* to the indorsement, and which destroys the title of the holder. The court recognize this principle as the settled law on the subject." The deposition for these purposes, therefore, is properly received.

The plaintiff then claims that this deposition proves, that the note was not made as an accommodation note, but was delivered to the payee *unconditionally*, to apply to Vance's credit, on the books of the payee and Bostwick; to be presented for discount or not, at the pleasure of the payee. Can the court receive that part of the deposition as evidence? We think not. It is in direct contradiction of the contract contained in the receipt; or, at least, it would vary the *legal import* of that contract, which the law would not permit. 3 Stark. Ev. 1009. Parol evidence is, also, inadmissible to vary the legal operation of an *instrument, by [249 evidence of an intention to that effect, which is not expressed in the instrument. The parol evidence now sought to be introduced, is to prove a verbal contract made at the same time with the written one, that the note was, in no event, to be returned to the makers; nor for any other specific purpose than for a credit on the books of the payee and Bostwick, and was delivered to the payee. This, in our view, can not be done.

How, then, stands the case? The defendants executed the note as an *accommodation note*, for the purpose of being discounted at

the Franklin Bank of Columbus; they delivered it to the payee for that purpose, and under an agreement, if discounted, a credit of part was to be made on the books of the payee and Bostwick, and the balance paid to the principal, Vance; if not discounted, to be returned to the makers. The payee and the plaintiff indorsed the note; it was presented by the payee, for discount, and refused; the indorsement of the plaintiff was stricken from the note; it was delivered to the plaintiff without consideration, and with notice of the agreement and specific purpose for which it was designed. The plaintiff is prosecuting this suit on the note for the benefit of the payee. The note has *thus* been given a circulation, which the parties did not design, contrary to the purpose for which it was delivered, and the court are *unanimously* of opinion the plaintiff can not recover.

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CASES

DECIDED BY THE

Supreme Court of Ohio,

IN BANK,

AT DECEMBER TERM, 1834.

PRESENT:

EBENEZER LANE,
JOHN C. WRIGHT,
REUBEN WOOD,
} JUDGES.†

THE STATE OF OHIO *v.* JOSEPH DAWSON AND RANSOM TRACY.

Held, that when a justice committed a person charged with crime, the court of common pleas, then in session, might recognize the accused for his appearance from day to day, without a habeas corpus, and without inquiry into the circumstances.

THIS cause was reserved in the county of Hamilton. The declaration filed in this cause avers, that on August 27, 1831, one William Dawson was committed to the jail of Hamilton county, by a justice of the peace, on a charge of passing *counterfeit bank notes*, knowing them to be such; and that, at the August term following, the said William being detained in custody of the sheriff, for the aforesaid charge, the said Joseph and Ransom, for the purpose of

†Judge Collett did not attend this term of court on account of indisposition.

admitting said William to bail, appeared in the court of common pleas, in open court, and acknowledged themselves to be indebted to the State of Ohio, in the sum of one thousand dollars, to be levied of their goods, chattels, lands, and tenements, if default should be made in the following condition, to wit: that William Dawson aforesaid should appear in the court aforesaid, from day to day, during the said August term, to answer to what might be objected against him, and not depart the court without leave.

252] *The declaration contains an averment, that during the term of said court, an *indictment*, in due form of law, was found against the said William, for having the *felonious* possession of bank notes, with the intention, *fraudulently*, to pass them, knowing them to be *counterfeit;* and that the crime charged in the indictment is the same for which the said William was committed by the justice, and admitted to bail by the court of common pleas.

The declaration then avers, that after the return of said indictment, and during the said term, were called in said court the said William Dawson, and the said Joseph and Ransom, and were required to produce the body of the said William, which they refused to do, and thereupon the said recognizance was, by the court, declared to be forfeited—of which indictment, recognizance, and forfeiture the plaintiff makes profert, and avers that the said *one thousand dollars*, mentioned in said recognizance, remains unpaid, etc.

To this declaration the defendants pleaded *nul tiel record*, on which issue was joined.

VANMATER, for the state, cited 1 Chit. Pl. 395, 317.

STRAIT, for defendants, cited 29 Ohio Stat. 155–165; Id. 197, secs. 20, 21; 4 Mass. 643–649; Id. 492; 16 Mass. 447.

Judge WOOD delivered the opinion of the court:

Under this issue, but two questions can be made. 1. Is the instrument declared on *a record?* 2. Is it *such a one* as the declaration describes? The defendants rest the defense mainly under the first branch of our inquiry, that the obligation declared on is *no record.* If he is correct in this position, there is an end of the plaintiff's case, in this form of action. A *scire facias* is not his appropriate nor legal remedy, unless the foundation of this action is *matter of record.* Such is the law, that where the statute does not

interpose and give the remedy to recover a debt, not of record, a *scire facias* does not lie.

To prove his cause of action, or his debt, as laid, the plaintiff has given in evidence the instrument purporting to be a recognizance, on which he claims to have declared, and which the minutes of the common pleas show was entered *thereon* and *filed* as part of their proceedings, on *September 7, 1831, and during the said [253 August term. This recognizance appears to me to be in the *usual form*, nor can I discover any *material variance* between it and the declaration. *Is it, then, matter of record?* The counsel for the defendants do not deny but that the *orders, and the decrees, and the minutes of the proceedings of the court of common pleas*, in those cases in which no final record is made, or is required to be made, are legal evidence and matter of record, if the court was in the exercise of its *legitimate power* and *authority*. The Supreme Court have so ruled on the circuit in more instances than one. The counsel, however, insist that the court had not the authority to take this recognizance, because they were not sitting as an "*examining court*," to inquire, where both the *person* and the *charge* were before them. *How is this?* The declaration avers that William Dawson had been committed by the justice on a charge of having in his possession counterfeit notes with the intention to pass them; and that, being in the custody of the sheriff under said commitment, he, Joseph Dawson and Ransom, the defendants, appeared in open court and entered into the recognizance in question. Were the court not in the exercise of their legitimate functions? It is true there is no *statutory provision* giving to the court the express power, when sitting as a court, *without inquiry*, to take the recognizance of a person accused of crime. It is a power, however, which has too long been exercised by all courts of criminal jurisdiction to be now questioned. Our constitution provides that all persons shall be bailable by sufficient sureties, unless for capital offenses. The statute directing the mode of calling an examining court has reference to a prisoner confined in jail, *in vacation*. The associate judges are to be notified; the prosecutor is to attend; and it is only in such case that an examination into the circumstances of the charge is required. Counsel must be wrong in supposing that the court of common pleas can not recognize a person in custody, charged with crime, who voluntarily submits to enter into such obligation, *without inquiry*, or without having

the *charge* before them. It is a power incident to every criminal court, and has been practiced in this state since its organization. The order of the court to the sheriff to bring up the prisoner, without a *habeas corpus*, to be admitted to bail, and to admit him 254] without inquiry, as to the circumstances *of the crime, to bail, for his appearance from day to day, and without the accusation being laid formally before the court, is, in our view, fully warranted by long-established usage. It follows, then, that such a recognizance, properly taken, is valid; and being a proceeding of our courts, authorized by law, required to be journalized, and actually entered on the minutes of a court of record, it is matter of record on which a *scire facias* will lie.

The counsel for the defendants next contends that this recognizance is in too *general terms;* is void for uncertainty, and, therefore, *not matter of record on which an action* can be sustained. The condition, as set out in the declaration, is, that the said William Dawson appear here, from day to day, during the present term, to answer what may be objected against him, and not depart without leave. This is in the usual form, and no substantial objection to it is perceivable. It is unnecessary to specify any charge in the recognizance which had been made against the accused, and for which alone he is to appear and answer, although it is necessary to aver in declaring on such a recognizance that the defendant was in custody on an accusation for some offense, or had been charged with some crime, before the court could hold him *legally* responsible for having forfeited his recognizance. And so the court decided in the State *v.* Doyle, Franklin County Supreme Court. *The declaration contains this averment.*

How then stands the case? The defendant, William Dawson, was committed by a magistrate on a *criminal charge*, while in custody, by order of the common pleas then in session; he entered into a recognizance with sureties for his appearance, from day to day, to answer what might be objected against him, and not to depart without leave; an indictment was found for the very crime for which he was committed; he was *called* and did not *appear*, and the recognizance forfeited. The plaintiff shows us the justice's docket, the *mittimus* and return, the recognizance, the indictment, and forfeiture; the *scire facias* contains every requisite, substantial averment; there appears to us to be *just such a record* as

the plaintiff has described, and we are *unanimous* in the opinion that the plaintiff is entitled to recover.

Judgment for plaintiff.

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*Lessee of Glover's Heirs *v.* William Ruffin. [255

Held, that the recital in a deed made under an order for partition, of the term when the order was made, is not conclusive, but may be explained by proofs.

Held, also, that in the case of an order for sale of real estate, on petition for partition, under the act of 1810, the proceeding being *in rem* before a court of competent jurisdiction, it must be presumed that the court made the order on a state of facts being proved that gave jurisdiction and authorized the exercise of it.

This cause was adjourned from the county of Hamilton. The lessors of the plaintiff claimed the premises in dispute as heirs at law of Elias Glover, deceased. The defendant claimed under a sale made by order of the court of common pleas of Hamilton county, upon a petition for partition among the heirs at law of the said Elias Glover, deceased. The validity of that sale was the matter presented for decision. At the trial, before the Supreme Court in Hamilton county, the plaintiff proved title in and possession by Elias Glover in his lifetime, and that the lessors of the plaintiff were his heirs at law. The defendant then offered in evidence proof of certain proceedings, in partition between the heirs at law of Elias Glover, before the court of common pleas of Hamilton county, resulting in a sale of the premises in question, under which the defendant deduced title to himself. The counsel for the plaintiffs objected to these proofs being received in evidence, but the court overruled the objection, and the proofs being admitted, a verdict was rendered for the defendant. The plaintiffs moved for a new trial, on the ground of error in admitting the evidence, and this motion was reserved for decision in this court.

After the reservation of the cause upon this point, the plaintiffs alleged the discovery of new testimony, as an additional ground for a new trial.

The proofs offered by the defendant, which were objected to, but received, consisted of a transcript of certain proceedings of the court of common pleas of Hamilton county, of which the subjoined is a copy:

"*The State of Ohio, Hamilton county, sct.*

"To the honorable the judges of the court of common pleas, within and for the county of Hamilton:

"The petition of the subscriber, who is a brother and one of the heirs at law of Elias Glover, Esq., deceased, respectfully showeth 256] that the said Elias, who died intestate and *without issue, was at the time of his death seized in his demesne as of fee of and in the following lots and tracts of lands situated in the town of Cincinnati and county of Hamilton, that is to say, lot No. 292 and lot No. 168, as the same are numbered and known on the plan of the said town, each containing seventy-two square perches, and also a part of lot No. 284, being thirty feet in front and seventy-two and one-third feet in depth; and your petitioner further states, that the said Elias left seven brothers and sisters, some of whom are under age, all of whom are living and are the heirs at law of the said Elias, to wit: Jerusha, married to Daniel Ferris; Esther Ann, maried to Amos Griffin; Polly, married to Samuel Shepherd; Cyrus, Arnold, Naomi, and Daniel; and your petitioner prays that the partition may be made of the premises above described, and that his proper proportion thereof may be set off and assigned to him in severalty, and your petitioner as in duty, etc.

"CYRUS B. GLOVER.

"Which said recited petition being read, and no objection being made, and the court being of opinion that the said petition is reasonable, court appoint Joseph Carpenter, Thomas Dugan, and Joseph Conn as commissioners to make partition.

"And an order for partition accordingly issued, clothed in the following words and figures, to wit:

"*The State of Ohio, Hamilton county, sct.*

"To Joseph Carpenter, Thomas Dugan, and Joseph Conn greeting:

"Whereas, a petition was presented to the court of common pleas for the county aforesaid, at April term, 1812, in the words following, to wit: (Here follow the petition, etc., as before recited.)

"It is ordered that you be appointed as commissioners to divide

and set off the petitioner his share as aforesaid, and that you in all things be directed and carefully observe the requisitions of the act, entitled, 'an act for the proving and recording wills and codicils, defining the duties of executors and administrators, the appointment of guardians, and *the distribution of insolvent [257 estates,' passed by the legislature of the State of Ohio.

"In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 7th day of April, 1812.

[L. S.]

"JOHN S. GANO, *Clerk.*

"Which said order was afterward duly returned with a report thereon, clothed in the following words and figures, to wit:

"The undersigned auditors having viewed the within mentioned lots, are of the opinion they can not be divided into seven shares.

"J. CARPENTER,
THOMAS DUGAN,
JOS. CONN,

"*April* 8, 1812. *Auditors.*

"Whereupon court order administrators to sell, and an order for sale issued, which is clothed in the words and figures following, to wit:

"*The State of Ohio, Hamilton county, sct.*

"To Daniel Symmes, Esq., administrator of the estate of Elias Glover, deceased:

"Whereas, on the petition of Cyrus B. Glover, a brother and an heir of the estate of said deceased, praying that a partition might be made of the following described lots and tracts of lands, situate in the town of Cincinnati and county of Hamilton, that is to say, lot No. 292, and lot No. 168, as the same are numbered and known on the plan of the said town, each containing seventy-two square perches; and also a part of lot No. 284, being thirty feet in front, and seventy-two and one-third feet in depth; the said petition being read, and the same being thought reasonable, it was ordered, that Joseph Carpenter, Thomas Dugan, and Joseph Conn, who were appointed commissioners, should view and make partition of the said premises as above described, upon which order so to them issued, they returned that they have viewed the above-mentioned lots, were of opinion that they could not be di-

vided into seven shares without a material injury, and reducing the value thereof. Therefore, you are hereby directed and 258] *ordered to proceed and sell the said or above-described property or estate at public vendue to the highest bidder; and that you in all things be directed by and carefully observe the requisitions of the act, entitled, 'an act for the proving and recording wills and codicils; defining the duties of executors and administrators, the appointment of guardians, and the distribution of insolvent estates,' etc., passed by the legislature of this state on Febuary 10, 1810.

"By order of the court.

"In testimony whereof, I have hereunto set my hand and affixed the seal of our said court in Cincinnati, this 10th day of April, A. D. 1812.

[L. S.] "JOHN S. GANO, *Clk. C. C. P. H. C.*"

And also a deed from Daniel Symmes, administrator of Elias Glover, deceased, conveying the premises in question to John Andrews, commencing with the following recital:

"This indenture, made this 7th day of April, in the year 1814, between Daniel Symmes, administrator of the estate of Elias Glover, deceased, in pursuance of an order of the court of common pleas of the county of Hamilton and State of Ohio, at the April term, 1813, directing the said administrator to make sale of the real estate of the deceased, as by reference to the records of said court will fully appear," etc. And a duly executed conveyance of the premises in dispute from John Andrews to the defendant.

MORRIS and DRAKE, for a new trial:

1. The verdict is against law.

2. The verdict is against evidence.

3. The court admitted illegal and improper evidence, which ought to have been rejected, to go to the jury.

4. The plaintiffs allege, that the said certified copy of the proceedings of the court of common pleas of the term of April, 1812, sets forth and contains proceedings that do not appear to have been had, and which were *not* had at the said April term, 1812, which fact has been discovered by the plaintiffs since the trial; as will appear by a certified transcript of the proceedings of the said court at said term, had on said petition for partition, made by William H. Harrison, the clerk of said court, and herewith filed.

*On the minutes of the court of the term of April, 1812, [259 there is among the proceedings of the 7th day of April, the following entry, to wit:

"Petition of the heirs of Elias Glover, deceased, praying for partition of the real estate. Court appoint Joseph Carpenter, Thomas Dugan, and Joseph Conn, to make division and report," etc. Immediately under the above entry, by way of interpolation, and on the same page, there is written the following words: "*Order issued April 7, 1812, returned that property could not be divided, and court ordered the administrator to sell—order for sale issued to administrator.*"

These are the only entries made on the subject at April term, 1812, and the whole of them are made on the same page and among the proceedings of April 7, 1812, of said court.

By the certified transcript last referred to, it appears that the petition was filed on April 7, 1812; and that the order or writ issued to the commissioners, by the clerk of said court, bears date April 7, 1812; the return made and assigned by the commissioners appointed to make partition bears date April 8, 1812. The order issued by the clerk of the court to the administrator bears date April 10, 1812; so that the interpolation made as aforesaid must have been made by the clerk or some other person, without any authority from the court, *after* April 10, 1812. It could not have been made on the 7th of April, the day on which it purports to have been made. The men appointed to make partition did not make their return until April 8, 1812; and until the return was so made, the court had no power to make an order for sale. And it is equally clear from the face of the proceedings that the entry or interpolation was made after April 10, 1812, the date of the order that was issued to the administrator by the clerk to sell, inasmuch as the entry refers to it. If we are correct in this, there is no order of April term, 1812, directing the administrator to sell by the authority of the court.

Why it was that the dates were omitted in the certified transcript of the proceedings produced in evidence by the defendant, we can not undertake to say, but that there is a *material* difference between the transcript and the entries on the minutes is certain.

*But suppose, for the sake of argument, that the whole [260 entry was made on April 7, 1812, still it does not help the matter,

as until the return of the commissioners appointed to make partition, which was not made until the 8th, the court had no power to make an order of sale, and an order so made would have been a nullity. If the entry was made after the 7th by the clerk or some other person, without the authority of the court, it would also be a nullity; give the defendant, then, either horn of the dilemma, and he can not escape from the fatal difficulty.

There is another objection to these entries. They are vague, uncertain, and unintelligible. They contain none of the names of the parties to it, nor any description of any real estate whatever; no order is made for partition, nor is there any reference made to any paper or document, by which anything like certainty is given to them.

The clerk of the court, it is true, has attempted to give something like a meaning to them, by appending thereunto a petition of Cyrus B. Glover against the other heirs of Elias Glover, deceased, and the two orders issued by the clerk under that petition, in the certified transcript produced, on the trial, by the defendant. But entries by themselves do not confer authority upon the administrator to sell. Can the act of the clerk give to them any additional force? Every entry on the minutes of the court should be complete in itself; they *only* are evidence of the acts of the court, and if void of themselves, the clerk by alteration or attempt to explain them, in making his record, can not make them valid. Destroy the petition, and the two writs issued by the clerk, contained in the transcript, and who would understand the meaning of the entries on the minutes to be an order to sell lot No. 168?

In April, 1812, at the time these proceedings were had, there were two separate statutes in force in this state, on the subject of partition of real estate. The one, an act entitled an act to provide for the partition of real estates, passed February 1, 1804, which may be found in 1 Chase's Stat. 402.

The other, sections 37 and 38 of the statute for proving and recording wills, codicils, defining the duties of administrators and 261] executors, and appointments of guardians; and the *distribution of insolvent estates, which may be found in 1 Chase's Stat. 63, 64, and passed February 10, 1810.

These statutes differ materially in their provisions and requisitions. In the orders issued by the clerk, the statute of 1808 is referred to as the one under which the proceedings were had.

This, however, was the mere act of the clerk, who was not authorized to determine the question. With this exception, there is nothing that would authorize the reference of the proceedings to the act of 1810.

By the petition, it does not appear that Cyrus B. Glover, the petitioner, was of full age, or that any one of the heirs of the deceased were minors; nor does it appear by the entries, that any proof, to that effect, was made to the court, or that any one of the requisites of sections 37 and 38 were complied with, so as to give the court jurisdiction under this statute.

If the necessary facts are not disclosed by the petition and entries, to give the court jurisdiction under the statute of 1808, the proceedings must have been under the statute of February 1, 1804, not one single provision of which, except the filing of the petition, was complied with. No notice was given to the defendants in said petition; no appraisement was made of the premises; under this act, the order of petition should have been issued to the sheriff of the county, and not the administrator. In any aspect in which it is viewed, we think the proceedings of April term, 1812, can not be maintained as giving to the administrator any power to sell the lot in question.

Again, we contend the defendant was bound to produce the order of the court, recited and referred to in the deed of the administrator, Symmes, to Andrews, under which, by the terms of the deed, the administrator assumed to act, without which the deed was a nullity and wholly inoperative. By the recital, the administrator assumes only to act under an order of the court of common pleas of Hamilton county, made at the term of April, 1813, "directing him to sell the real estate of the deceased." On the face of the deed there is no pretense of any other authority.

Can the recital in the deed of the order to sell be contradicted or explained, and a different authority be substituted for it, so as to give the deed validity? It seems to us that this would be opening the door to a most dangerous *principle. If you [262 can contradict the power under which an officer assumes to act, and substitute another authority in its place, you may, on the same principle, explain away the plain, literal import of every deed, and give a totally different meaning and effect, from the expressed intention on its face. The administrator has no beneficial interest in the land of his intestate. He may be authorized to sell

under the law, by pursuing its provisions. There is no equity attaching as against the estate, unless the provisions of the law are pursued, even though a sale is made and a full consideration paid. In this respect, his deeds stand on the same footing with sheriffs' deeds.

A sheriff's deed can not be given in evidence without the production of the judgment, levy, and execution, under which he assumes in and by the deed to act. They are, in the eye of the law, the basis of the title, and without them the deed is a nullity. In order to apply the doctrine of misrecitals to the case under consideration, we will put a case. Land is levied on and sold under a judgment of April term, 1812, of the court of common pleas of Hamilton county, and at the same time, the sheriff has another execution against the same defendant in favor of a different party, which he fails or is directed not to levy; he sells under the junior judgment, and makes a deed to the purchaser, which recites the junior judgment, levy, and sale. The purchaser pays his money and accepts his deed. Now, suppose that prior to such junior judgment, the execution defendant sells and conveys to a *bona fide* purchaser; now, in an action of ejectment between the two purchasers, could the purchaser under the junior judgment say and prove that there was a misrecital in his deed, and show the judgment of a prior date to the sale and deed from the execution defendant; and that the execution upon the same was in the hands of the sheriff as above stated, upon which he might have levied, but did not? We think it can not be doubted for a moment that this could not be done. The judgment and execution are the foundation of the sheriff's title in the one case, and the order recited in the administrator's deed the foundation of the other case; and the deed is the best evidence of what judgment or order the administrator and sheriff acted under in making the sale. If the judgment or execution, under which the sheriff assumes to act, is a nullity, or if there is no such judgment as the 263] one *he assumes to act under, he passes no title by his sale and deed; and we can not perceive any good reason why the same should not hold as to the administrator's deeds. Can the fact, that there was an order in existence authorizing the administrator to sell, warrant the presumption by the court, against the express declaration in the deed, that the administrator acted under that order?

N. WRIGHT, STORER, and FOX, for defendant:

The case presents, when all the objections raised by the plaintiff to the defendant's title are examined, two points:

1. Was the order properly obtained, and did the statute authorize the act of the court?

2. Was the order properly executed?

The order was made pursuant to the administration law of February 10, 1810, 1 Chase's Stat. 683, as appears by the order itself, and while the act was in force. By the provisions of that statute, the heirs of an intestate may apply for partition, and if the application, to use the language of the section, "is *reasonable*, and the court are satisfied of the facts contained therein," the prayer may be granted. Sec. 37.

It is in evidence that one of the heirs filed his petition—the names of the others were inserted, some of whom are alleged to be minors, as is also proved in this case—and the fact of the death, seizin, etc., of the intestate averred. It is also in proof that the court acted on the petition, appointed commissioners to make partition, who reported that the property could not be divided, and therefore assessed its value. On this return the court again acted, and ordered that the administrator proceed to sell the same in the mode pointed out in the statute.

On this view of the case, we take it for granted, that everything that the law required should be proved before the court acted, must be held to have been proved, and the order or judgment of the court must stand, and can not be collaterally impeached. 3 Ohio, 357, 560, 561; 4 Ohio, 130; Thompson *v.* Fowler, 2 Peters, 163; Rickard *v.* Williams, 7 Wheat. 59; Moore *v.* White, 6 Johns. Ch. 387; 11 Serg. 429; 6 Id. 184; 14 Id. 184.

The fact whether notice was given, or proof made, or the matter presented furnished sufficient evidence for the judgment of *the court is not now to be discussed. If, however, an in- [264
quiry were permitted, we would insist that there is:

1. A statement in the petition that some of the heirs are minors; and if it was a material averment, it was unquestionably proved. But suppose it was not proved, the judgment is good until reversed—the court had jurisdiction, and that is sufficient for the purchaser.

2. If notice to the heirs was necessary, still the same presumption of its having been given exists; but under the law of 1810,

no such notice was necessary. Previous to the year 1822, the heirs of an intestate were never made parties to a petition for the sale of land; the stature did not require it should be done in terms, and the theory on which the lands of deceased persons were subjected to sale did not make it necessary. The seizure and condemnation of real estate, by the probate court, were assimilated to the proceedings in courts of admiralty, or of the exchequer, and were regarded as being *in rem* altogether—the heir having the right to make himself a voluntary party to the application. Scott's Pet. *v.* Hancock, 13 Mass. 166; Ruliff's case, 1 Id. 240; Repub. *v.* Rham, 2 S. & R. 269; McPherson *v.* Cunliff, 11 Id. 428, Milnor *v.* Peters, 1 Peters, 269.

But if a notice was requisite, it is obvious that no *process* or *particular form* of notice is required by the statute; and that, if given, it would not necessarily form any part of the record to be preserved. It would stand like any other item of proof in the cause, to be made to the court, in such way as they might require. It is always presumed that a court of justice has before it all the necessary proof to warrant their judgment. The verity of every decision rests upon this principle; without it, not one adjudication in a hundred could be sustained. It was long a common practice, in proceedings under the partition law, to make the proof of notice in open court, at the time of presenting the petition. Such proof might or might not be entered of record, and might or might not be a cause of error, if omitted; but the want of it could not make the adjudication void. The court was competent to keep its own records, in its own way, and to judge of the proof on which it 265] made its orders; and, having judged, this *court, twenty two years after, not sitting in error, can not reverse them. Jennings *v.* Carson, 4 Cranch, 25.

An ordinary record of a judgment by default, aside from our statute, shows no notice to the defendant, and the validity of such a judgment rests upon the above principle.

In Brown *v.* Wood, 17 Mass. 72, a case of probate of a will, the statute expressly required notice to the heirs, and no such notice appeared among the proceedings; but the court held that the notice must be presumed, on the principle above stated.

Even if these proceedings were not valid to bind all the heirs, they are certainly valid to bind Cyrus B. Glover, who filed the

petition; and he or his heirs being joined in this demise, there can be no recovery.

3. As to the points whether an appraisement was made previous to the order of the sale, and if made, whether it was conducted as the statute requires, sufficient answer is found in the principle already alluded to, "*omnia præsumitur bene, et rite acta sunt.*" If error should appear, it can not avail the plaintiff in this contingency. All that can be asked is, had the court jurisdiction of the subject matter? Should this be admitted, the mode by which the court came to their conclusion can not be questioned. If they erred in making an order of sale, without sufficient proof on which to found that order, it might, perhaps, have been a cause of reversal on error; but this court are not now sitting in error on those proceedings. Even the erroneous proceedings of a sheriff, a mere ministerial officer, will not defeat his deed, but everything will be presumed to have been regular (Allen's Lessee *v.* Parish, 3 Ohio, 190); much less can the judicial errors of a competent court defeat a title made pursuant to its adjudications.

But, in addition to this, we say that no appraisement was required in the case by law. Neither the administration law of 1810, nor the general partition law in force at the time, required any valuation with reference to the sale. The valuation provided for in the latter of those statutes was merely to fix the price at which one of the parties might take the property, not to regulate the sale; neither of those statutes limited the sale to any particular proportion of the valuation. In the administration law no provision was made for either party to take the property; of course no valuation was necessary, and none was provided for.

*But was the order properly executed? It is said it [266 should have been directed to the sheriff; but the statute is express that it shall be the duty of the administrator to sell, and if it were otherwise it was only an error of the court, and did not affect the purchaser's title. If so, did he perform the service? No proof of the sale need now be required, other than what is afforded by the deed. All the steps between the granting of the order and the execution of the deed, whether they are the notices, or the mode of sale, or the compliance of the purchaser with its conditions, are to be presumed to have been pursued. In the case of Allen's Lessee *v.* Parish, 3 Ohio, 191, the point, as it regards a sheriff's sale, was

fully settled. "The purchaser," says the court, "depends upon the *judgment*, the levy, and the deed; whether the officer sell before or after the return, whether he makes a correct return, or no return at all to the writ, it is immaterial, provided the writ was duly issued, and the levy was made before the return." This is but the language of the Supreme Court of the United States, in Wheaton *v.* Sexton, 4 Wheat. 503.

So in New York: Jackson *v.* Bartlett, 8 Johns. 284; Jackson *v.* Robins, 15 Johns. 537; Heister *v.* Fortune, 2 Bin. 46.

See also Lessee of Goforth *v.* Longworth, 4 Ohio, 129, where it is said public policy requires that presumptions should be made in support of sales, especially respecting matters *in pais;* and it is now well settled that a liberal construction is given to statutes authorizing sales of real estate by executors and administrators.

If the order is regarded as valid, and the deed and the possession under it held to furnish evidence of the sale, a question is still to be discussed whether the deed is sustained by the order, as the recital does not correspond with the actual date of the order relied on. We hold it to be settled law that no recital of the power of the trustee need appear in the instrument executing the trust. 3 Ohio, 326. The matter is *in pais*, and can be proved *aliunde*. Hence, if the recital is unnecessary, a reference made to a paper or a fact, which proves to be mistaken or erroneous, may be rejected as surplusage. Cleve's case, 6 Co. 17; 4 Cruise, 44; Powell on Powers, 111, 126; Sugden on Powers, 292. This rule is adopted by the courts of equity in England, and is sustained by the decision of our own court. 2 Sch. & Lef. 404; 3 Johns. 267] *Ch. 551; 10 Ves. 257; and the rule itself is nothing more than giving effect to the intention of the parties, "*ut res magis valeat quam pereat.*"

The general principle being established, let us apply it to the present case. The deed refers to an order of April term, 1813, when the true date should have been April term, 1812, and it is thereupon contended that the conveyance is void.

The statute of 1810 mentions no form of the deed, the administrator or executor is authorized generally to convey. If the instrument contained no recital, we should then have been required to exhibit an order, and there could be no just objection; but as it is, we do not doubt the difficulty may be easily obviated.

Thus, in Lessee of Mathers *v.* Thompson, 3 Ohio, 274, a variance

between the levy on an execution, and the description of the land in the deed, may be explained by parol.

In Jackson *v.* Streeter, 5 Cow. 629, it was held that the misrecital of the *date* of the *judgment* in the sheriff's deed was not material, provided it appeared that there was a subsisting judgment and execution. So in Jackson *v.* Walker, 4 Wend. 264; Jackson *v.* Pratt, 10 Johns. 381; Jackson *v.* Davis, 18 Johns. 9; 9 Cow. 182. And this court have always acted on the same principle with regard to sheriffs' and marshals' sales. Hence, if the deed recites a judgment for more or less than the true amount, the court permits the party to show by parol that the levy and sale was in fact made on a judgment of a different amount. None of the sales made by the marshal of Ohio could be sustained, were this practice not allowed; for all their executions embrace the increased costs, and hence every execution recites a judgment for a different amount, although all issued in one suit. In the present case, we proved by the man who drew the deed that the administrator directed him to draw the deed, because he had sold the lot to Andrews. There is no pretense that the lot was not sold on the order of the court, nor that there was any order of the court in 1813. The order is so referred to as to make it a part of the deed; the year was immaterial, as the reference would have been perfect without it. The use of the recital of such a power is merely to show, unequivocally, that the grantor intends to act by virtue of a power, and not by virtue of an interest; of course a misrecital can not be material; the law will refer the act to *the power [268 wherever it can be made applicable. On this point, we ask leave to refer the court to the cases cited in argument for defendants in Ludlow's Lessee *v.* Parks, 4 Ohio, 7, and also 4 Wend. 462, 585, relating to executions.

We differ with counsel as to there not appearing of record sufficient facts to give the court jurisdiction. It does appear Elias Glover died seized of lot No. 168. It does appear that Cyrus B. Glover was one of his heirs. It does appear there were six other brothers, some of whom were minors. It does appear said E. Glover died intestate. Nothing else, certainly, is required to give the court jurisdiction under the act of February 10, 1810. 1 Chase Stat. 683.

But it is said no proof of these facts appears in the record. There is the same proof that appears in any case; the judgment

of the court is evidence of it. Whether there was any minor among the heirs was a question which naturally arose in the cause, and the decision of it concluded all concerned until reversed. The adjudication upon every other fact in the cause was of the same character. Dabney *v.* Manning, 3 Ohio, 325; Goforth *v.* Longworth, 4 Id. 130.

This case also disposes of another question raised, viz: that the order of sale should have been directed to the sheriff and not to the administrator—it is only error. But the statute of 1810 expressly requires the order to issue to the administrator.

It is said the proceedings are void, because the other heirs were not served with process—such we conceive is not the law in cases of partition. A suit for partition is not considered an adversary suit. It is a mere substituting of a definite portion of an estate for an indefinite interest in the whole.

Where the statute authorizing the proceedings does not require service of process, the judgment of partition can not be declared void. 5 Bin. 1.

Judge LANE delivered the opinion of the court:

The leading question in this case is, do the recorded proceedings of the court of common pleas of Hamilton county show the facts necessary to invest that court with jurisdiction to order the sale of the premises under which the defendant claims? 269] *The plaintiffs show a complete title, unless it has been legally transferred from them in the manner alleged by the defendant.

The act of February 10, 1810, section 37, provides for partition in cases where an intestate leaves lands and heirs part over age and part under, and authorizes the heir of full age to petition for partition. After specifying the facts necessary to be set forth in the petition, the act proceeds: "*Such court, if they are well satisfied in the proof aforesaid, and are of opinion that the petition is reasonable, shall appoint,*" etc. It then provides (sec. 38) that if the person appointed, report that the lands can not be divided with advantage, "*the court shall order and direct the administrator, etc., to sell such estate to the highest bidder,*" etc.

In this case we have the petition for partition. It distinctly alleges that E. Glover died intestate, seized of the premises in question, and that he "*left seven brothers and sisters, some of whom*

are under age," etc. The transcript of the record contains the adjudication of the court, "*which said petition being read, and no objection being made, and the court being of opinion said petition is reasonable, court appoint J. C., etc., commissioners to make partition.*" A transcript of the order to the commissioners is given, and their return that, "*having viewed the within-mentioned lots, they are of opinion they can not be divided into seven shares.*" The transcript proceeds: "*Whereupon court order administrator to sell, and an order of sale issued,*" etc.

It is objected to these proceedings that it does not appear, by the petition or otherwise, that the petitioner for partition was of full age; and this, it is agreed, is indispensable to sustain the jurisdiction of the court. We do not think so. The fact that part of the heirs were of full age and that part were minors is indispensable to authorize the proceedings and sale. The petition is to be preferred by an heir of full age. This petition recites that a part of the heirs were minors. The court proceeded upon proofs, and we hold ourselves bound to presume that the proofs produced satisfied the court that the petitioner was of full age. The petition assumes this fact, and as to the authority of the court to take any order upon it, under the statute, depended upon its existence, a presumption can not be raised that the court proceeded without the requisite proof.

*In the case of Thompson *v.* Tomlie, 2 Peters, 164, 165, [270 this point was adjudged in the Supreme Court of the United States. The question there arose under a law of Maryland, in this particular very analogous to the law of Ohio. It was a sale upon petition for partition, which could only be made where part of the heirs were minors and part were of full age. An exception was taken that this fact did not appear on the proceedings, and proof was adduced to show that at the time of the sale the heirs were all minors. This proof was held inadmissible, and with respect to the allegations of the petition, the court say: "From what is stated it may reasonably be inferred that it appeared before the court that one of the heirs was of full age. The petition presented to the court for the appointment of commissioners, and which was the commencement of the proceedings, in setting out the parties interested, states that Robert Tomlie died intestate, leaving the following children and heirs at law, viz: Margaret, since intermarried with Francis Beveridge, and Alice Tomlie and James

Tomlie, which said Alice and James are infants under the age of twenty-one years. Why specially allege that these two were minors, if Margaret was also a minor? Every reasonable intendment is to be made in favor of the proceedings, and their allegation in the partition will fairly admit of the conclusion that the petitioners intended to assert that Alice and James only were under age. The age of the heirs was, at all events, a matter of fact upon which the court was to judge, and the law nowhere requires the court to enter on the record the evidence upon which they decided that fact. And how can we now say but that the court had satisfactory evidence before them that one of the heirs was of full age?"

It appears to us that this reasoning applies strongly to the case before us. We therefore adopt it; and our conclusion consequently is, that a case of jurisdiction, in the court of common pleas, to order the sale of the real estate in question, is sufficiently shown. That point being established, it is well settled that errors or irregularities in the proceedings do not vitiate the final decision, and that if such exist, they can not be noticed collaterally.

It is objected that no notice is shown to have been given to the coparceners. The law does not require such notice to be given. It seems to have been the policy of the law to regard a decedent's 271] estate as subject to the court of *probate, as well as for distribution among heirs, for the payment of debts. Judicial proceedings, in such cases, were *in rem*, and intended to bind all parties in interest. 13 Mass. 166; 17 Id. 32; 11 Serg. & R. 428.

It is alleged, as an objection to the validity of the sale, that no appraisement, such as the law required, was made. The act of February 10, 1810, under which the sale was made, does not require an appraisement. But if such were the requisitions, the appraisement would be a matter *in pais*, the proof of which we would certainly presume. Indeed, upon the authority of the case of Thompson *v.* Tomlie, before cited, we should even refuse to receive evidence to establish the contrary.

The administrator's deed recites a sale made under an order of court of April, 1813; and the plaintiffs insist that this recital precludes the defendant from resorting to the order of 1812, to support his deed. We do not think so. The order clothed the administrator with power to sell. The deed is evidence of the sale under the power; but it was not necessary that it should be recited in it. A misrecital, when it is not an essential part of the

conveyance, may be corrected. And, in this case, a majority of the court are satisfied that the proofs show that the sale was, in fact, made under the order of April, 1812.

A suggestion of newly discovered evidence is made, and a new trial asked upon that ground. In actions of ejectment, where the verdict is for the defendant, it is rarely set aside for newly discovered testimony. 5 Ohio, 248. No rights are affected, and the plaintiff can bring a new suit and prosecute it with as little prejudice, as it could be retried if a new trial were granted.

Judgment on the verdict.

WILLIAM JOHNS *v.* LEMUEL JOHNS.

Held, that the assignment of insolvent's choses in action vests the legal interest in the commissioner, and that he alone can maintain an action.

THIS cause was reserved for decision here, in Hamilton county. It was an action of debt upon simple contract; the plea, *nil debet*. The point presented for decision arose on the *proofs. Previous to the taking effect of the insolvent act of 1831, and subsequent to the period assigned for the making of the alleged contract, upon which the declaration was founded, the plaintiff had surrendered his property to the commissioner of insolvents, in conformity with the then existing law, and had been discharged from custody. At the trial, upon proof of these facts, the court ruled that the plaintiff could not sustain the action, whereupon he became nonsuit. A motion was then made to set aside the *nonsuit*, on the ground of error in the court directing it. The decision of this motion was reserved. [272

FOX, for the plaintiff.

STRAIT, for the defendant.

MORRIS, on the same side.

WOOD, J., delivered the opinion of the court:

A single question is presented for our consideration. It is this:

Do the choses in action of an insolvent debtor, who made his assignment under the act for the relief of insolvent debtors of February, 1824, pass, and the legal interest in them vest in the commissioner of insolvents? If they do so pass the decision on the circuit was correct; if not, a new trial must be granted.

Section 2 of the act of 1824 provides, that "no suit pending at the time of the assignment of such insolvent's estate to said commissioner shall abate or be discontinued by reason of such assignment, but the same shall proceed," etc. This express provision, that a suit pending shall not abate, evinces the distinct understanding of the legislature that the whole legal interest of the insolvent was transferred by the assignment to the commissioner, and, consequently, a suit pending would abate unless provision was made to the contrary. We do not doubt that this is the correct construction of that statute.

In the same section of the act this further provision is made: "But any new suit, which may be commenced, shall be brought in the name of said commissioner or in the name of the insolvent, as the case may require." It is difficult to ascertain what case is 273] contemplated or embraced by this alternative *provision. It can not apply to choses in action not negotiable, because negotiability is matter of positive legislative provision, and it is competent for the legislature to make any contract assignable and vest the legal interest, with a right to sue in his own name, in the assignee.

The insolvent's assignment is made under the law, and the same law prescribes what interest and what rights it shall confer.

Section 3 of the act provides, that any person desirous of taking the benefit of this act shall make and deliver to said commissioner an accurate schedule of all debts by him owing, to whom due, etc., and also the debts and demands to him due or in any manner accruing, and of all property, etc., by him owned; and shall convey, transfer, and assign to said commissioner in trust, for the benefit of his creditors by deed or instrument of writing, all debts and demands to him due or to become due in any manner accruing, and that no form of words shall be necessary for said conveyance.

By the transfer, conveyance, and assignment here spoken of, we understand a parting with the legal interest of the insolvent, and vesting it in the commissioner. It was perfectly competent for the legislature to provide in what manner it should be done.

They have said it should be by deed, and that deed casts on the commissioner all the legal, as well as equitable rights of the insolvent. It is an ordinary principle that the action must be brought in the name of the party in whom the legal interest is vested, or whose legal right has been affected. That person is the commissioner, and the absolute control that was intended to be given him over the insolvent's estate is widened by another provision authorizing him, by arbitration or otherwise, to adjust all controversies that may arise in the settlement of the insolvent's estate, and to prosecute any suit in law or equity, which, to him, may appear necessary. There was no error in the opinion of the court; the nonsuit was properly taken, and the motion to set aside is overruled.

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*Nathaniel Torbet v. Goldsmith Coffin. [274

A mistake of the clerk in entering the judgment of this court, at the December term, 1833, putting the name of the defendant in error for that of the plaintiff, ordered to be amended.

This was a motion to amend a clerical error, in entering the judgment of the court in bank, at the December term, 1833. Nathaniel Torbet was plaintiff in error, and Goldsmith Coffin defendant in error. The judgment was reversed, but in the entry on the minutes, the names of the parties were reversed; that of Coffin, the defendant in error, being written as the party to be restored, instead of Torbet, the plaintiff in error, in whose favor judgment was given. In behalf of Torbet, it was moved that the clerk of this court so amend the entry as to make it conform to the judgment. It was so ordered, and the following entry directed to be made:

"It being made to appear, to the satisfaction of the court, that in the entry of the decision of this case, at the last term, a clerical error has intervened in this, that in the judgment of restitution the name of Coffin is written in the place of Torbet, therefore it is ordered that the said error be corrected, and the proper entry be now made as of the last term. Ordered that the entry, amended as aforesaid, be certified to the Supreme Court of Fayette county."

JOHN PICKENS, *alias* JOHN K. PICKENS, *v.* THE STATE OF OHIO.

Where an indictment alleges that an affidavit was made, purporting to have been made by John K. Pickens, and the affidavit produced is actually made by John Pickens, no reference being had to John K. Pickens, the variance is fatal. Judgment reversed, and order to discharge prisoner.

THIS was a writ of error certified here for decision from the county of Meigs. The plaintiff in error was indicted for perjury. The offense was alleged to have been committed in making affidavit to a plea of *non est factum*, in a trial before a justice of the peace, in which the plaintiff in error was defendant. In the suit before the justice, a note was produced in the following terms:

"For value received, I promise to pay unto Henry Wheelbager, 275] *order, the amount of four dollars and fifty cents without defalcation for value received of him, as witness my hand and seal, this March 17, A. D. 1834.

His
JOHN + K. PICKENS.
mark.

The affidavit was in these words:

Personally came before me, William Crooks, a justice of the peace in and for Sutton township, John Pickens, and made oath that he never did make, sign, or place his signature or mark to a certain note which he is called this day to answer to; said note appears to have been been made payable to Henry Wheelbager or order, bearing date March 17, 1834, amount four dollars and fifty cents.

His
JOHN + PICKENS.
mark.

The indictment charged the accused by the name of John K. Pickens, *alias* John Pickens. In describing the note in question, the following terms were used: "*a note or writing obligatory purporting to have been executed by the said John K. Pickens*, alias *John Pickens, for the payment*," etc.

In describing the affidavit in support of the plea of *non est factum*, the indictment set forth that "*the said John K. Pickens* alias *John Pickens, made a certain paper writing* PURPORTING *to be an affidavit in writing of him, the said John K. Pickens*, alias *John Pickens*," etc.

At the trial in the court of common pleas, the counsel for the accused, objected to the admission in evidence of the note on account of a variance from the note described in the indictment; the note presented being subscribed John K. Pickens only, no *alias*, or other name, as John Pickens, appearing to it. The objection was overruled, and the note admitted in evidence. The counsel for the accused objected also to the admission in evidence of the affidavit, it being subscribed and *purporting* to be made by John Pickens only, no *alias* John K. Pickens appearing to be connected with it. This objection was also overruled, and the affidavit admitted in evidence. The counsel for the accused excepted to these opinions of the court of common pleas, and the accused being convicted, this writ of error was brought, and the final execution of the sentence suspended.

*Brazee, for plaintiff in error: [276

The first question for the consideration of the court, upon this record, is, were those papers properly admitted as evidence to the jury? That part of the indictment which sets out the note and affidavit, sets them out as "*purporting*" to be made by "John K. Pickens, *alias* John Pickens." The note appears to have been signed "John K. Pickens" only, and the affidavit appears to be signed "John Pickens" and in its body it declares that it was made by John Pickens. The word "*purport*" has a technical meaning, as fixed and settled as any term known to the law. In 2 East's Crown Law, 980, it is said that, "in all cases the word *purport* imports what appears *on the face of the instrument;* for want of attending to which many indictments have been set aside." In 2 Russell, 1485, it is also defined, "to import what appears on the face of the instrument." In the same book, page 364, it is declared to be the *apparent* and not the *legal import.* In Jones' case, the instrument was laid in some of the counts to be a *paper writing purporting to be a bank note*, it was holden, as it did not purport on the face of it to be a bank note, the counts could not be supported. 2 Russell, 363; 2 East, 883.

In Reading's case, the indictment charged that the bill of exchange, the subject of the forgery, *purported* to be directed to one John King, by the name and description of John Ring; the bill was in fact directed to John Ring; the prisoner being convicted, the twelve judges held that judgment ought to be arrested, on the

ground that the bill did not in, fact, *purport* to be directed to one John King, as stated in the indictment. Buller, Justice, in delivering the opinion of the judges in that case, said, "it is clear that where an instrument is to be set forth the description, that it *purports* a particular fact, necessarily means that what is stated as the purport of the instrument appears on the face of the instrument itself." 2 Russell, 363; 2 East, 981. In the Commonwealth *v.* Kearses, 1 Virginia Cases, 109, the indictment alleged that a forged certificate *purported* to be signed by Bowling Starke, and the signature was B. Starke; the variance was held to be fatal. Does the note *purport*, or appear upon its face to be signed by "John K. Pickens, *alias* John Pickens?" Certaintly not, and if the "*alias* John Pickens" be regarded by the court as descriptive 277] of the note, the *variance must be fatal. But should the court incline to the opinion, that John K. Pickens" only is descriptive of the note, and that the "*alias* John Pickens" is descriptive of the person of the defendant, the note may have been properly admitted as evidence. But the affidavit can not be disposed of in the same way; if the "*alias* John Pickens," in that part of the indictment descriptive of the note, be regarded by the court as descriptive of the *person* of the defendant, and not of the note, for the same reason, the court, to be consistent, must hold that the "*alias* John Pickens," in that part of the indictment which describes the affidavit, is also descriptive of the *person* of the defendant, and not of the affidavit. And then it will appear that the court below, under the allegation in the indictment that the affidavit *purported* to have been made and executed by "John K. Pickens," admitted in evidence an affidavit, which in the body, as well as by the signature, *purported* and appeared upon its face to have been executed by "John Pickens." It appears to me most clearly that the affidavit admitted in evidence is not the affidavit set out in the indictment, and that a paper signed "John Pickens" does not *purport* or appear upon its face to have been signed by "John K. Pickens." The proposition needs only to be stated in its simplest form to elucidate the error.

H. H. Hunter, contra:

The first point made is that the note and affidavit set out in the bill of exceptions were improperly admitted in evidence to the jury. And, *first*, as to the note; that it set out in the indictment

as "*purporting*" to have been executed by the said "John K. Pickens, *alias* John Pickens;" whereas the note offered in evidence *purports* to be signed or executed John his ⋈ mark K. Pickens, which is variant from the indictment. This part of the indictment is inartificially drawn, but is substantially good. The difficulty complained of by the plaintiff in error does not *in fact* exist, though *apparently* it does. It is to be observed that the defendant is named and described in the indictment, by the name of John K. Pickens, *alias* John Pickens. And the averment in the indictment is substantially that the note purported to be executed by the defendant; not that the name *signed to the note* was John K. Pickens, *alias* John Pickens. The cases cited by counsel for *plaintiff in error to show the legal effect of the word "*pur-* [278
port" are doubtless good law, but as we think inapplicable to the case. As to the affidavit, we think clearly the same answer may be made. This averment of the indictment is, that the said John K. Pickens, *alias* John Pickens, made a certain paper writing *purporting* to be an affidavit of him the said John K. Pickens, *alias* John Pickens. Clearly this averment does not undertake to set out the name attached to the affidavit, but merely to aver (as in the case of the note) that the affidavit purported to be executed by the *defendant*, who, in the indictment, is presented by the name of John K. Pickens *alias*, John Pickens. The question recurs, do the papers set out in the bill of exceptions purport to be executed *by the defendant?* For that is what we claim the averments of the indictment to be in substance.

As before stated, the name signed to the note is John his ⋈ mark K. Pickens, and the affidavit is signed John Pickens. The defendant is described in the indictment by both these names, or rather as being known by either of them. In fact, then, these papers do purport to be signed *by the defendant;* one under each of the names by which he is known and described in the indictment.

Held by the COURT:

That, in this case, the indictment, by reciting that the note was executed by John K. Pickens, *alias* John Pickens, describes not the note itself, but the person executing it. Consequently there was no variance between the note described and the note presented in evidence. There was, therefore, no error in admitting it.

Held, further, that the indictment, in describing the affidavit,

reciting that "the said John K. Pickens, *alias* John Pickens, made a certain paper writing *purporting* to be an affidavit in writing of him, the said John K. Pickens, *alias* John Pickens," in fact describes a paper subscribed "John K. Pickens, *alias* John Pickens." The paper produced in evidence, being subscribed John Pickens only, was variant from that described in the indictment, and, therefore, inadmissible as evidence.

Judgment reversed, and the accused ordered to be discharged.

279] *G. RING AND JAMES RICE *v.* SAMUEL FOSTER.

A writing in these words, "Three months after date we promise to pay Samuel Foster, or order, one hundred and forty-three dollars and twenty-two cents, provided the said Samuel Foster delivers the crop of tobacco raised by him and Trockmiller, then said Foster is to have one-fourth of the sum in hand, and, in addition, three dollars and fifty cents per hundred for that part yet to be delivered, payable one-fourth in hand, and the balance in one hundred and twenty days, April 28, 1827," is a promissory note within the statute, dispensing with proof in certain cases. In an action upon such a writing, executed by four, and process served on two only, it is not necessary to prove the execution by the other two.

THIS was a writ of error adjourned here for decision from the county of Fairfield. The original action was founded upon a writing in the following words:

"Three months after date we promise to pay Samuel Foster one hundred and forty-three dollars and twenty-two cents, provided said Foster delivers the crop of tobacco raised by him and Trockmiller; then said Foster is to have one-fourth of the above in hand, and in addition thereunto three dollars and fifty cents for the part undelivered, payable one-fourth in hand, the balance in one hundred and twenty days.

"THOS. CUSHING,
RING & RICE,
J. H. HARRIS, by *Th. H. Cushing.*"

The original writ was issued against T. Cushing, Ring & Rice, and J. H. Harris, but was served on Ring & Rice only.

The declaration contains three counts. The first was as upon a note in writing for the payment of one hundred and forty-three dollars and twenty-two cents, in the usual form, but reciting the writing in all its terms. The second count recited the same written contract as the first, and proceeded to aver the delivery of the crop of tobacco raised by the plaintiff and Trockmiller, amounting to five thousand pounds, and demanded, besides the one hundred and forty-three dollars and twenty-two cents, three dollars and fifty cents per hundred for the five thousand pounds of tobacco. The third was a general count for tobacco and other articles sold and delivered.

The general issue was pleaded, but no affidavit annexed denying the execution of the writing. At the trial the defendants objected to the admission of the writing declared on in evidence without proof of its execution, but the court overruled the objection. A bill of exceptions was taken, and the *verdict [280 and judgment being for the plaintiff, this writ of error was brought.

H. H. Hunter, for the plaintiff in error, contended that the writing was not legally admissible in evidence without proof. He argued that it was not a note within the statute, and that if it were the statute did not apply to the makers not served with process nor otherwise before the court; that the plaintiff, to recover, must prove the execution of the writing by all the subscribers to it, as he had named them all in his process; that if the plea of Ring & Rice without affidavit was an admission as to them, it was no admission as to Cushing and Harris, and proof of their execution must also be made. He cited Palmer v. Hogson, 1 Esp. N. P. 135; Chitty on Bills, 381.

Irvin and Stanbery, on the other side, cited Chitty on Bills, 323; Duncan v. Campbell, 1 Ohio, 115.

Judge Lane delivered the opinion of the court:

Two points are taken by the plaintiff in error. This writing is not a promissory note; if it is, its production is no proof of its execution against Cushing and Hunter, and without such proof the defendants can not be charged. The phraseology of the statute seems to preclude the latter of these objections. It provides that

a "plea of *non assumpsit* offered by a person to be charged as maker of a note, it shall not be necessary for the plaintiff to prove the making of *the note on which such suit is brought*, unless the party offering the plea shall make affidavit of its truth." This statute is essentially remedial, designed where a deed or note is set forth in the declaration to impose upon the plaintiff the necessity of proving it in those cases only in which the execution of the instrument counted upon shall be denied upon oath, and no sound rule of interpretation justifies a restrictive construction. It is "the note on which the suit is brought," which shall be deemed duly executed, in the absence of the affidavit. If, then, the writing declared upon be a promissory note, it was properly offered to the jury.

And we do not assent to the limited meaning which the plaintiff's counsel would attach to the phrase, "promissory note." It 281] need not be negotiable. Any absolute promise to *pay a certain sum of money at a specified time, if it constitute the entire contract, may be taken to be a promissory note. Was this engagement of that description?

It was an absolute promise to pay one hundred and forty-three dollars and twenty-two cents in three months; but if a contingency happened, which depended on the promise, one-fourth the amount became payable sooner. In addition to this the maker promised to pay three dollars and fifty cents for tobacco, if delivered. The first part is a promissory note merely; does the additional terms change this character?

A majority of the court believe not. It will be observed that it is not *per se* a contract, binding Foster to the delivery of the tobacco; it was a promise to pay, if delivered. The other contract was complete without it; the additional terms acquired effect at the option of Foster; he held their absolute promise to pay a specified sum in three months, which constituted the entire contract, if he took no steps to extend the liability of his debtors beyond. His first count is framed upon this promise; either writing is in every sense a promissory note, and as such rendered evidence to support it, by the statute, without proof of its execution.

It is further urged that the first and second counts are bad, from omitting to set forth a consideration. If the writing be a promissory note, none is necessary to be averred under our decis-

ions. 1 Ohio, 118. If the consideration to pay for the tobacco be the delivery, the delivery is shown in the second count. The alleged misjoinder of parties does not exist in the pleading.

Judgment is affirmed.

Judge WRIGHT dissented:

I understand a promissory note to be a written promise by one to another, to pay a certain sum at all events, in a specified time.

The writing under consideration is in these words:

"Three months after date we promise to pay Samuel Foster, or order, one hundred and forty-three dollars and twenty-two cents; provided Samuel Foster delivers the crop of tobacco raised by him and Trockmiller, then said Foster is to have one-fourth of the above in hand, and, in addition, three dollars and fifty cents per hundred for that part yet to be *delivered, payable one- [282 fourth in hand, and the balance in one hundred and twenty days. April 28, 1827.

"THOMAS H. CUSHING,
RING & RICE,
J. H. HARRIS, *per.*
T. H. Cushing"

By this agreement, other things are embraced than the mere payment of a certain sum at a stipulated time—the purchase of an entire crop of tobacco, at a certain rate per hundred, is embraced within the legal import of the instrument; it looks to the purchase and delivery of this crop by a third party, Trockmiller, and the price to be paid. Upon the completion of this stipulation, depends what sums shall be paid down, or in ninety or one hundred and twenty days. If the crop is delivered, then one hundred and twenty-one dollars and sixty-one cents, and one-fourth of the crop at three dollars and fifty cents per hundred, is to be paid in hand, and one hundred and twenty-one dollars and sixty-one cents in ninety days, and three-quarters of the crop of tobacco in one hundred and twenty days. I am unable to see, how the first member of this article can be disconnected from the residue, so as to make it a promissory note. Indeed, the plaintiff declares upon the article as one for the tobacco in one count. Can the instrument change its character, at the will of the party holding it, and be on the first count a note, and on the second an

article, as he may offer it? It must, in law, be either a note or an article—it can not be both.

I think it not a promissory note; and, therefore, not within the statute dispensing with proof of execution.

E. Webb *v.* E. Stevenson.

Contract to convey as soon as purchase money is paid is mutual, and calls for simultaneous performance. Party that would sue upon such a contract must perform or tender performance of his own part, before a cause of action accrues.

This cause was adjourned from the county of Pickaway. The plaintiff declares in assumpsit upon an agreement entered into between the parties, by which the plaintiff agreed to sell to the defendant lot 17 in Circleville, and to convey the same to him in 283] *fee, as soon as the purchase money should be paid*, and *also to procure a release of a mortgage upon the lot held by a third person, or if he did not, that the defendant should be at liberty to pay off the mortgage, and deduct the amount from the purchase money of the lot. By which agreement the defendant undertook to pay the plaintiff the sum of thirty-two dollars and seventy-five cents for the lot, on April 1, 1834. The plaintiff avers that he conveyed the lot to the defendant by a good deed, executed by himself and wife, and was, on said 1st of April, and still is, ready and willing to deliver the same to the defendant, on his paying the purchase money. He assigns for breach the non-payment of the purchase money.

To this the defendant demurs:

1. Because it is not averred that notice was given to the defendant of the execution of the deed, or any offer or tender to deliver it to the defendant.

2. Because there is no averment that the plaintiff had procured a release of the mortgage or had a clear title to convey.

J. L. Green, for defendant:

A tender of the deed, or an offer to deliver it, and an averment

of such tender or offer, is indispensable to enable the plaintiff to recover. The form in which the averment is made does not enable the plaintiff to get round the difficulty. The averment is that "*the plaintiff did convey*, etc., and was ready and *willing to deliver*," etc. The operative words, the *soul* of the averment, is wanting. What boots it if the deed was executed, and peradventure locked up in the chest of the plaintiff? He should have tendered it, or told us he was ready, and offered to deliver the deed upon the payment of the purchase money.

It is only necessary for the defendant here to establish that the agreements in this case are dependent on mutual covenants. In Jones *v.* Barkley, Douglas, 689, Lord Mansfield has laid down the distinction between covenants that are mutual and independent; such as are conditions and are dependent, and such as are mutual covenants, to be performed at the same time. So in the case of Kingston *v.* Preston, Doug. 690, 691, which last case is cited by the Supreme Court of Ohio, in Courcier and Ravises *v.* Graham, 1 Ohio, 340. *These distinctions have not been exactly pre- [284 served in all the reported cases, but dependent and mutual covenants are considered as meaning the same thing. Goodison *v.* Nunn, 4 Term, 761.

The settled rule, however, seems to be that whether the covenants be dependent or not must be determined by the good sense of the case and the evident meaning of the parties. And one of the rules for determining the covenants to be dependent, growing out of this good sense, is where it evidently appears that neither party intended to rely upon the personal security of the other. The following cases fully illustrate the rules on this point, viz: Campbell *v.* Jones, 6 Term, 570–576; 7 Term, 130; Kingston *v.* Preston, Doug. 688; Green *v.* Reynolds, 2 Johns. 206; Porter *v.* Shepherd, 6 Term, 668; Glazebrook *v.* Woodrow, 8 Term, 370, 371; Havilock *v.* Geddes, 10 East, 504. In the last case it said "that where mutual covenants go to the whole consideration on both sides, they are mutual conditions." Powell on Contracts, 370, and 1 Salkeld, 171, are to the same point.

In the case of Callonell *v.* Briggs, 1 Salk. 113, which is a leading case upon this subject, Lord Holt observes that though there be mutual promises, yet if one thing be the consideration of the other, a performance is necessary to be averred. That was a contract to deliver stock, and the principle there laid down was

recognized in the case of Morton *v.* Lamb, 7 Term, 130, by Lord Kenyon.

Now, how is this case? Webb agrees to make a deed *so soon* as the purchase money is paid, and Stevenson agrees to pay the purchase money on a particular day. Who was bound to perform the first act? They were to be concurrent; to be done at the same time. Webb was not bound to deliver the deed, but was bound to have one ready, and to offer to deliver it upon payment. Neither party intended to rely upon the personal security of the other. Suppose we transpose these conditions, and read them that so soon as Webb delivers the deed the purchase money should be paid. Would Webb have been bound to have delivered the deed until the purchase money was paid or offered? Could he be required to throw himself upon the personal security of the other party, who might, by conveying to a third person, have cut off Webb's lien on the land, or at least put him to the trouble and 285] risk of *seeking his money out of the property through a court of chancery? The conditions were clearly mutual, and to be performed at the same time, and the want of the averment of performance, or readiness and tender, is fatal.

It is said in Sug. on Vend. 171, margin 228, that in agreements for purchase, the covenants are always considered dependent where a contrary intention does not expressly appear. And in page 172, "If a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent, for he can not proceed against the other without an actual performance on his part, or a tender and refusal."

I refer the court, in addition, to the following cases: Ramsey *v.* Brailsford, 2 Des. 582; Green *v.* Reynolds, 2 Johns. 207; Porter *v.* Rose, 12 Johns. 209; 5 Johns. 181; 10 Johns. 266, etc.; Parker *v.* Parmelee, 20 Johns. 130. The last case is conceived precisely analogous to this. There the plaintiff agreed to sell defendant a piece of land, and defendant covenanted to pay for the same on January 1, 1818. And the plaintiff covenanted that *upon* the faithful performance by the defendant (*i. e., so soon as the purchase money was paid*) of his covenants, he would execute a deed.

The plaintiff was required to aver performance on the second point. It was certainly of consequence to the defendant that the release should be obtained, by the plaintiff, as upon its execution and delivery all questions of difficulty, from that quar-

ter, were at an end. It was part of the assurance upon which the title of the defendant materially depended. It was evidently intended that all questions growing out of the mortgage should be first settled, or so adjusted that the defendant might, with perfect safety, pay the purchase money. The defendant made it a condition of the purchase, reserving to himself, however, the right to pay out of the purchase money whatever might appear due upon the mortgage. Before he could safely pay anything, it was proper that he should be fully advised of the amount due the mortgage. Important questions might arise. Ought there not, then, to be some averment to show the court that all had been done to place the defendant in that position of security, which would make it inexcusable on his part to fail in performing his part of the agreement? It does not lay with Webb to say that it was *un- [286 necessary for him to discharge the mortgage, as the defendant had reserved to himself the right to do it. Much depended upon Webb's agency in adjusting the amount due, and even though he may conceive it unnecessary, he had bound himself to do it. If a party bind himself to do an act, even though the performance be unnecessary, he must do it. Doughty v. Neale, 1 Saund. 214.

If it was important to the defendant that the plaintiff should get in the lien for the reason above given, it was manifestly the duty of the plaintiff to have given timely notice to defendant of his failure to do so. Can the court suppose that the defendant, on the 1st of April, coming with the impression that the plaintiff had complied with the contract, and prepared to surrender the release with the deed of conveyance, and finding the whole question open as to the settlement of principal and interest due on the mortgage, was under any obligation to proceed to a consummation of the contract? I am aware of the general rule in relation to notice, but does not this case come within the spirit, if not the letter of that rule?

J. Olds, for the plaintiff, contended that as the writing declared on, is not recited nor set forth at length in the declaration, nor on oyer, will it, for the purposes of this argument, necessarily be taken to contain what appears in the declaration, and nothing more. In relation, then, to the second cause of demurrer, it seems to be necessary only to remark that the objection can not go to the action, but only to the amount of the recovery. If Webb

procured a release of the mortgage, he would be entitled to recover the whole amount of the purchase money, otherwise only the *excess* over the amount due on the mortgage, because Stevenson being authorized to pay off the mortgage out of the purchase money, would be authorized to retain a sum sufficient to make that payment, if made by Webb. The amount of the recovery is to be determined by evidence, and the defendant, by a proper plea, may open the door for the admission of such evidence as will ascertain the amount to be recovered. In this case, under the general issue, evidence may be received, showing what should be recovered. A declaration showing good cause of action for any amount is deemed sufficient to call for a defense. To this point, 287] so obviously *correct upon the general principles of pleading, no authority need be adduced.

The first question raised on the demurrer seems to require more consideration. The defendant insists that a tender of a conveyance on the part of plaintiff should have been made, in order to give him a cause of action upon the contract. It should here be kept in mind that this is an action of *assumpsit*, not *covenant*. In assumpsit upon an express promise, if there be a sufficient consideration for the promise, and a sufficient averment of the consideration and undertaking, and of the non-performance, what more is necessary to give *prima facie* cause of action? Should not excuses for non-performance be presented by plea? But if this is to be assimilated to an action of covenant, and the law of covenants to be applied, we insist that the defendant has not correctly interpreted the contract between these parties. Covenants have long been divided into the three classes, as quoted by defendant's counsel from Doug. 690; yet courts have hitherto found great difficulty in determining to which class certain covenants belong. Some covenants are found to have the properties common to those of each and all of those classes; hence the judge finds the same difficulty in determining their classification as the physician does in ascertaining the disease of his patient, when the symptoms equally indicate the existence of different diseases. It appears to me, however, that much of this difficulty has been occasioned by an attempt to reduce all covenants to two classes only, or in making a third class not essentially different from one of the others. Thus, it is frequently said, that covenants are either dependent or independent, and those considered dependent are treated as mutu-

ally dependent; and those classed as independent, considered as mutually independent. The middle class of Lord Mansfield, whose classification is so frequently quoted, namely, "conditions dependent upon each other," can scarcely be distinguished by that definition from his third class of "mutual covenants to be performed at the same time," because these last are also conditions dependent on each other. If it be not presumption in me to venture upon a classification, I would thus define the three classes, to wit: covenants mutual and independent, covenants mutual and dependent, and covenants dependent and independent, that is, agreements in which the covenant of one party is dependent, and the covenant *of the other party is independent. Mansfield's lan- [288
guage, in relation to his middle class of "conditions dependent on each other," seems to imply a mutual dependence, yet the courts, in order to bring all covenants into the three classes, have been obliged to assign those wherein the performance of the one party was made to depend on the prior performance by the other party of a condition precedent to this middle class. If this, then, be a correct classification, or a correct definition of the classes heretofore made, it would follow that with the class of covenants, mutual and independent, either party might sue without an offer to perform on his part, each relying on the covenant of the other, and not upon its performance. And with the second class, covenants mutual and dependent, neither could sue without a performance or offer to perform, because each relied upon the performance by the other, and not upon the covenant only. And with the third class, which is supposed to be the correct interpretation of Mansfield's middle class, covenants dependent and independent, the one party could not sue without a performance or an offer to perform, yet the other party might do it.

I shall endeavor to show that the agreement declared on in this case belongs to this class of covenants, dependent and independent; and that Stevenson could not sue without paying the purchase money or tendering payment, but that Webb may sue without making the conveyance or offering to make it. Stevenson promised, in consideration of the premises, to pay a certain amount of money on the 1st day of April. And what were the premises which constituted this consideration? They were that the plaintiff had granted, bargained, and sold, and had bound himself to convey in fee a lot of ground, so soon as the purchase

money should be paid. He did not promise upon condition that Webb would convey money on the first day of April, but he promised in consideration that Webb had bargained and sold, and had bound himself to convey. Here, then, did not defendant rely upon what had been done, and upon the covenant of Webb to do more, and not upon the performance of that covenant for his security? "If," say all the books, "it shall appear to have been the intention of the parties to trust each to the personal security of the other, the covenants must be considered as independent." And why, let me ask, when it seems to have been the intention of one party to rely upon the personal security of the 289] *other, may not his covenant be considered independent, even though the other party choose to make his covenant dependent? When the court can not say which party was to perform the first act, then they will consider the covenants as mutually dependent. But, in this case, can there be any doubt as to which party was to perform the first act? The defendant covenants to pay the money on a given day; the plaintiff does not covenant to convey on that day; he covenants to convey so soon as the purchase money is paid, that is, immediately after the payment of the purchase money, not immediately before the payment. Had Stevenson tendered the money on the 2d day of April instead of the 1st, would not Webb have been bound to convey as soon thereafter as a deed could be prepared? I think he would, because he had contracted to convey so soon as the purchase money was paid, and if the payment were not deferred to such an unreasonable time as to amount to an abandonment of the contract, whenever payment was made Webb was bound to convey. This, then, shows that Webb had not covenanted to convey on any particular day nor at any time, unless the purchase money should first be paid—clearly making the performance by Stevenson a condition precedent. In the case of Fuller *v.* Adm'rs of Smith, 6 Cow. 13, it was held that where a conveyance was to be made on the payment of the purchase money, the vendee must not only pay or tender the money, but after waiting a reasonable time for the conveyance to be made out, must present himself to receive it. May it not be implied from this, that the court making that decision were of the opinion that the vendor need not move toward the execution, or even the preparation of a deed, until the purchase money is paid or tendered.

The strongest case presented by the defendant's counsel is that of Parker *v.* Parmelee, 20 Johns. 130. But if the New York decisions are relied on, I would present the case of Northrup *v.* Northrup, 6 Cowen, 296, which appears to me to overrule the former decisions. It is true the court there make a distinction between that and the former cases, referring the one to the second class of Lord Mansfield, and the others to the third. But is not this a distinction without a difference? If, in the one case, a bond and mortgage are to be given up and discharged upon the payment of a sum of money, and in the other case a conveyance is to be made *upon the payment of a certain sum of money— [290 where is the difference? The counsel for defendant in the case in Cowen considered his case as belonging to the same class with that in 20 Johnson, for he cited that same case in support of his position. But the court say "the plea is bad." The payment of the money is a condition precedent. A general averment of his readiness to perform is all that can be necessary. Suppose, in this case, the covenant of Stevenson, as it now is, to make payment on the 1st day of April, and that Webb had covenanted to convey on the 2d day of April, then the defendant would certainly be driven from his position, that these covenants were to be performed *at the same time*, and instead of referring them to Mansfield's third class, he would have to refer them either to the first or second class. Where shall we stop then? Is not the principle the same, whether Webb's covenant was to be performed on the *day after* the performance by Stevenson, or on the *after part of the same day?* If we apply the principle of the case of Fuller *v.* Adm'rs of Smith, that time is to be given to the vendor after the payment to *prepare* a conveyance, then Webb would have kept his covenant by conveying the day after the payment. But whether the time be a day, an hour, or a minute, it is sufficient that it is *after* the performance by Stevenson, and that a performance by him is a condition *precedent.*

But let these covenants be classed as they may, it is sufficient to aver that a deed was made and ready to be delivered. Such is the language of the court, in the case in 5 Johns. 179, and is so quoted by our court in 1 Ohio, 341, 342, with the addition that in such a case, "it is not necessary to aver performance, or an actual tender of performance." The argument for the defendant admits that Webb was not bound to actually deliver the deed, and

part with his title until he received his money. What good sense, then, is there in requiring him to *show* it to Stevenson, and say, "Sir, here is your deed, which you shall have when you pay me the money, and not till then?" It would appear to me to be really a sham tender to say, here is your deed, but you are not entitled to it, and shall not have it at present. It is contrary to the common notion of a tender. When we tender money we admit it to be due, and the other party entitled to receive it. To say as above, 291] you shall have your deed when you pay me *the money, is saying nothing more than was said when the contract was first made; it is only repeating the terms of the contract, for by that Webb had said to Stevenson, you shall have your deed when you pay the money. And if we give the contract the most rigid construction contended for, that Webb should deliver the deed the very next minute after the payment of the purchase money, then he had performed on his part, for he had the deed prepared, signed, sealed, and acknowledged, and ready to be delivered the very minute the money should be paid. The defense then resolves itself into this, that the plaintiff did not first do that which by the contract was to be last done.

GREEN, in reply:

The counsel for the plaintiff does not meet the argument for the defendant on the second point. We say the obtaining of the release was a duty he imposed upon himself, and which he was bound to perform for the reasons assigned in the opening. The alternative was for the benefit and protection of the defendant, of which he might avail himself by averment and proof of the plaintiff's inability to do what he had contracted to do.

Counsel attempts a distinction between covenant and assumpsit, which, as applicable to this case, is not clear. It is certainly true, in general, that if there be a sufficient consideration to support the promise laid, and a sufficient averment of non-performance, a *prima facie* case is made; but here, the doing that which the plaintiff has not averred to have been done, should appear to have been done, is essential to the presentation of such a *prima facie* case as to put us upon a plea.

I shall not attempt to follow Mr. Olds in his classification of covenants. The distinction seems to my mind plain enough, if we look to the explanation of Lord Mansfield, when classifying

them. 1 Ohio, 340. Mr. Olds places this case as coming under that class of covenants which he denominates dependent and independent; that is, when the covenant of one party is dependent and the covenant of the other party independent. If, by the contract, the money was to have been paid on the 1st day of April, and the deed was to have been executed on the 1st day of May following, the case would come under Mr. Olds' class of dependent and independent covenants. There the one party would trust to *the personal security of the other, as the acts are [292 not to be performed at the same time. But here I maintain that the day of payment being fixed, and the deed to be made and delivered at the same time, it is clear that there was no intention on the part of either party to trust to the other. Stevenson certainly did promise to pay upon condition that the deed should be made and delivered on the 1st day of April. Suppose the 1st day of April had been fixed for the execution and delivery of the deed, as well as payment of the purchase money; would it not then have been, past all doubt, the duty of Webb to tender the deed? Do the words "*so soon*" mean a day after, or a week, or a year? If not a day, can they mean an hour, or a minute? In short, was it not the duty of Webb to have said, "here is your deed, sir; pay me the money, and I will deliver it to you." Here I am met by a case from 6 Cowen, 13, where the court say, a "reasonable time should be allowed the vendor to prepare the conveyance." What time did Webb need to "prepare a conveyance," which he avers had been executed and acknowledged by himself and wife, and was then ready for delivery? In that case, in Cowen, Smith, the party to convey, was dead, and Fuller having paid the purchase money, had made no demand of the heirs of Smith; but commenced suit against the administrator to recover back the purchase money. A very different case from this. The court there, however, go no further than to say, "that the purchaser should present himself to receive the conveyance, which he has thus required to be furnished." Are this court advised that Stevenson did not present himself to receive the conveyance on the 1st day of April? Are they not, on the contrary, bound to presume that he did so present himself, as his absence is not averred?

Counsel refers the court to the case of Northrup *v.* Northrup, 6 Cow. 296, which would seem to be a parallel case with that at bar; but clearly the judge does not so consider it, for he places it as

coming under the second class of Lord Mansfield's classification, and the case of Parker *v.* Parmelee, 20 Johns. 130, as belonging to the third of Lord Mansfield's classes. I respectfully request the court to compare the cases in 6 Cowen and 20 Johnson. If any difference exist, I confess it is beyond my comprehension.

The case in 5 Johns. 177, was a very different case from this. 293] There the plaintiff could not have executed the *mortgage until the defendant had made the deed conveying the title; and the court say, "there was nothing to be done by the plaintiff, which he had power to do;" but, says the judge, "there are cases where both parties have the power to perform without any act being previously necessary to be done by the other. In all such cases, it is necessary that the party bringing an action should aver (if the act has not been actually performed) a tender and refusal, which is equivalent to a performance.

The case of Courcier and Ravises *v.* Graham, 1 Ohio, 340, is also relied upon by plaintiff's counsel. That case decides, that where the acts are to be done at the same time, either party, to charge the other, must aver performance or an offer to perform.

Judge WRIGHT delivered the opinion of the court:

The question presented to this demurrer requires us to determine, whether the undertaking of the parties in the agreement declared upon is dependent or independent. In contracts of sale and purchase of lands, where the acts to complete an agreement are to be done at the same time, we understand the rule to be, that if either would sue the other for a breach of the contract, he must perform on his part, or tender a performance. Sug. Vend. 171. A late case in the Supreme Court in New York, Parker *v.* Parmelee, 20 Johns. 130, seems analogous to the one at bar. The plaintiff, in that case, had agreed to sell the defendant a piece of land and to convey it to him, if he faithfully performed his part of the agreement; and the defendants agreed to pay the purchase money on a given day. The court held it essential to the plaintiff's right to recover that he should aver a performance, or a tender on his part. We doubted, at first, whether in the case before us, inasmuch as the defendant agreed to pay the money to the plaintiff, he was not bound to seek him, and on that account, we doubted if the plaintiff's readiness to perform, in case the defendant came to pay, was not sufficiently averred to entitled him to recover. But, upon

the whole, we think the most intelligible and reasonable rule requires of either party to contracts for the performance of simultaneous acts, before he sues, to put his adversary in the wrong by performing, or offering to perform, on his part. The same principle has been decided at this term, in McCoy's Adm'rs v. Bixbee's Adm'rs, *post*.

*As to the outstanding mortgage in this case, the plaintiff [294 undertook to obtain its release; the defendant did not undertake to do so, though the privilege was given him, if he choose to avail himself of it, to obtain its discharge by applying to that object the required proportion of the purchase money. The declaration, in reciting the agreement of the parties, shows a mortgage to have existed. It nowhere shows its release. *Prima facie*, therefore, it remains a lien upon the lot. The purchaser of the lot is not bound to get it in, though under the contract, he may do so if he please. The seller, then, must aver that he has performed his part of the contract, and his ability to convey, before he shows a right to sue. He undertakes to make a deed in fee; and from his own showing, it appears he has not the fee to grant.

The declaration, therefore, shows no right in the plaintiff to sue, because he has not done what he undertook to do himself to fulfill his part of the contract, and to put his adversary in the wrong.

J. MULFORD AND G. ALBERTSON, ADM'RS OF P. TULLIS, DECEASED, *v.* A. YOUNG, ADM'R OF G. WILEY, DECEASED.

Contract of lease recites that in consideration of the rents hereinafter mentioned and agreed to be paid, lessor leases lessee a farm, and stipulates that lessee may use timber for certain purposes, and may seed certain grounds, "*in consideration whereof*" the lessee agrees to pay certain rents. Plaintiff (lessor) must aver that the lessee enjoyed the premises, or that lessor tendered him the enjoyment. Without such averment, the declaration is bad.

Recital—that by the contract declared on, the defendant acknowledged himself bound to pay *one hundred and eighty dollars*, to be paid at a time stated. The contract exhibited upon oyer stipulates to pay "*a yearly rent of sixty dollars.*" It is a fatal variance.

Wife can not make a valid lease of her husbands lands.

Where the contract of the wife may become obligatory by the ratification of the husband, it must be declared upon as the husband's contract, without reference to the wife.

THIS cause was adjourned here for decision from the county of Pickaway. It was an action of debt, and the declaration contained four counts. The first was in these words:

"For that, whereas the said George Wiley, in his lifetime, to wit, on the 3d day of September, in the year of our Lord, 1819, at Circleville, in the county aforesaid, for and in consideration that the said Jonathan Tullis had before that time leased and to farm let unto *him, the said George Wiley, by his certain [295 article of agreement with the said Wiley, hereinafter named, a certain tract of land therein described, he, the said Wiley, by the same article of agreement, or writing obligatory, sealed with his seal, and now shown to the court here, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound to the said Jonathan Tullis, in his lifetime, in the sum of one hundred and eighty dollars, part and parcel, etc., to be paid to the said Jonathan Tullis, sixty dollars thereof on or before March 1, 1821; sixty dollars thereof on or before March 1, 1822, and sixty dollars on or before March 1, 1823.

The second count recited that the defendant's intestate, "for and in consideration that Nancy Tullis, the then wife of the said Jonathan Tullis, had before that time leased and to farm let unto him, the said Wiley, by her certain articles of agreement with the said Wiley, hereafter named, a certain tract of land, he, the said Wiley, by the same articles of agreement, a writing obligatory to the court here shown, the date whereof is on the same day and year aforesaid, acknowledged himself to be held and firmly bound to the said Nancy Tullis, who died in the lifetime of her husband, the said Jonathan Tullis, the said writing obligatory being reduced to the possession of the said Jonathan Tullis during the lifetime of the said Nancy Tullis and Jonathan Tullis, and duly ratified by the said Jonathan Tullis in his lifetime, in the other sum of two hundred dollars," etc.

The third count is upon the same contract recited in the second, and is the same in terms, except that it omits to aver the ratification by the husband of the contract of the wife.

The fourth count is for use and occupation, to which the plea of *nil debet* is put in.

The defendant claimed oyer of the writings obligatory specified in the first, and in the second and third counts of the declaration, and demurred specially: 1. For that the writings declared on contain dependent covenants, and there is no averment of performance, or tender of, or readiness to perform on the part of the plaintiffs. 2. No action of debt can be sustained on said writings, they containing no acknowledgment of an existing debt.

*The writing specified in the first count, or that part of it [296 which it is *material* to consider, is in these words: "Jonathan Tullis, in consideration of the rents hereinafter mentioned and agreed to be paid to him, hath letten to the said George Wiley all the cleared land on the farm belonging to the said Jonathan Tullis, situate and lying in Springfield township, Ross county." The writing obligatory then contains several stipulations, to wit: that the said Wiley may use sufficient timber to repair the fences; to have the liberty of seeding the land, and to use for his own benefit the large timber, etc., and then follows a clause of the agreement in these words: "*In consideration whereof*, the said George Wiley agrees to pay the aforesaid yearly rent of sixty dollars;" and by another part of the agreement the said Wiley was to have the use of the ground for *three years* from March 1, 1820.

The opinion of the court does not require that the contents of the other writing declared on in the second and third counts should be set out. The cause was adjourned here for a decision upon the demurrer.

OLDS, in support of the demurrer.

DOAN, contra, cited 1 Chit. Pl. 112–114; Reeves D. Rel. 130–132; Cro. Jas. 206; Doug. 83; 15 Johns. 479; 1 Chitty, 643; 2 Saund. 379, 380, n. 16; 1 Wils. 248; 1 New Rep. 43.

Judge WOOD delivered the opinion of the court:

In respect to the first count, the defendant maintains that the consideration of the undertaking on the part of his intestate is not letting merely, but, in addition, the actual enjoyment of the premises leased, and hence he deduces the necessity of an averment that his intestate actually possessed and enjoyed the premises.

It is not difficult to suppose a case in which an agreement to lease, or an actual lease, may be predicated upon such circumstances, and expressed in such terms as that the contract itself, without possession or enjoyment, would constitute a good consideration for the covenant to pay rent. The case, however, is not of ordinary occurrence, and in our opinion this is not such a one. By the 297] terms of the agreement *lessor stipulates that, in consideration of the agreement of the lessee to pay the rents specified, he had leased the premises named with certain enumerated privileges, to take timber to repair the fences, to use the large timber for the lessee's benefit, to have the liberty of seeding; then comes the covenants of the lessee: "In consideration whereof, the said G. Tullis agrees to pay the aforesaid yearly rent." Here is a clear expression for what consideration the rent was to be paid. It was for the enjoyment of the uses and benefits previously contracted for by the lessor, the enjoyment, the seeding, the timber. These are precedent to the covenant to pay rent, and expressly form the consideration for the rent to be paid. The fact of the enjoyment, or of the tender of the privilege to enjoy, made by the lessor to the lessee, ought to be averred in the declaration. This averment must be material, because the proof of the facts, at the trial, would be preliminary to the plaintiff's right of recovery. In this particular the declaration is defective.

In the opinion of the court there is an objection to this count, besides the omission of this averment. In describing the instrument declared on, the plaintiff avers that by the said article the defendant "acknowledged himself to be held and firmly bound to the said Tullis, in his lifetime, in the sum of one hundred and eighty dollars, to be paid," etc. The written agreement is, by oyer, made part of the pleadings. Upon examining it, the stipulation is in these words: "The said George Wiley, in consideration hereof, agrees to pay the aforesaid yearly rent of sixty dollars to the said George Tullis, at the times above limited for payment." Here is a palpable misdescription of the writing upon which the declaration is founded—a fatal variance between the obligation declared on and the one exhibited upon the demand of oyer. As the pleadings stand, this variance is presented by them, and furnishes a separate and distinct ground for sustaining the demurrer.

The second count is upon a contract of lease made by a married

woman. A married woman can not make a lease of her husband's real estate; consequently, if the writing declared on is an operative lease, it is void. If we consider it a contract which the wife *could* make and the husband *might* ratify, it should be declared on as the contract of the husband. How it was made is a fact *in pais*, to be proved at the trial. *In either aspect of the case the [298 count is bad, and the demurrer to it well taken.

There are the same objections to the third count that vitiate the second, with this, in addition, that the contract is alleged to have been made by the wife, and the husband's ratification is not averred. A wife can not bind her husband by a contract of this description, even if it be not a lease, without his ratification of such contract. The recital that the contract was made by the wife, without an averment of the husband's ratification, does not make a case for the husband to reason upon.

The issue in fact on the fourth count, not having yet been tried, the cause is remanded for that purpose only. The demurrer to the three first counts is sustained.

JOHN BROWN *v.* ENOS MANNING AND OTHERS.

Dedication of lands for a public use accrues as a grant; a grantee is not necessary to its validity.

A dedication in specific terms on the recorded plat of a town, is not to be affected by parol proof of the intention of the donors.

Town plat made by agent; his numbering of lots, laying out of streets, etc., recognized by the proprietors and acted upon by them, is sufficient proof of his authority.

Individual owner of adjacent lots may proceed in equity to enjoin proprietors from making private appropriations of a square dedicated for public purposes.

THIS is a suit in chancery reserved in the county of Miami. The plaintiff is the owner of town lots Nos. 51 and 52, in the town of Piqua. The defendants are the heirs of Manning, who, with Caldwell, were the original proprietors of the land. In 1807 the town of Piqua was laid out by them, and a plat made, subscribed, and acknowledged by them, by their agent, A. Brandon, and recorded,

Upon this map the lots are numbered, the streets named, field notes are appended, in which some of the lots are described as "lying next the public square;" and a piece of ground near the middle is marked "*P. Square.*" It is shown in proof that the proprietors have conveyed town lots, and have described some as "lying adjoining the public square," and as "numbered according to the recorded plat of the town in the recorder's office." The land has remained uninclosed, and used as a common until lately. The defendants are now asserting a title over the 299] *property, have sold a part, and caused inclosures and buildings to be erected upon it. The object of this bill is to declare the title, and to cause the erections to be abated as nuisances.

The answers admit the proprietorship and laying out of the town; deny Brandon's authority as agent; and aver that the ground in question was designed for the county buildings; that when all hope of placing the seat of justice in Piqua was destroyed, by the division of the county of Miami, they have entered and held possession, claiming title.

Testimony is taken, which is noted below as far as necessary for decision.

CRANE and SCHENCK, for plaintiff:

1. The original owner, John Manning, under whom the defendants claim, having laid out this square in Piqua, as a public square, recorded the town plat and sold building lots on the square, has thereby dedicated the same to the public. 22 Ohio L. 301; City of Cincinnati *v.* Lessees of Edward White, 6 Peters, 431. Brandon is proved to have been the agent for John Manning, and his acts as such have been repeatedly recognized by Manning. If the proceedings in relation to the town plat were not in strict conformity to the law, though the defendants have not supported by proof this allegation in their answer, yet the acquiescence of Manning and his subsequent recognition of the acts of Brandon will preclude the defendants from setting up any claim to the public square. Pritchard *v.* Atkinson, 1 N. H. Cas. 1; 4 N. H. Cas. 420; Trenchard *v.* Price, 2 Mumf. 468.

2. The complainant may maintain the suit; for the occupation of this square is not only a common or public nuisance, but works a special injury to the complainant, and affects the value and en-

joyment of his property. Gardner *v.* Trustees of Newburg, 2 2 Johns. 162; Newburg Turnkike Co. *v.* Miller, 5 Johns. Ch. 101; Coming and others *v.* Lomazze, 6 Johns. Ch. 438; Attorney-General *v.* Nichol, 16 Ves. 338; 4 Ohio, 376; Mayo *v.* Marchie, 3 Mumf. 358.

This case is easily distinguished from that of Smith and others *v.* Comm'rs of Butler County, 6 Ohio, 101. There the complainants, alleging no individual injury, or if any, several *in- [300 juries, for which each of them had his remedy at law, sought to restrain the public agents of the county from leasing real property given for the erection of public buildings. In the present case, the right of the public to the use of the public square in Piqua rests on the same principles as the right of the use of the streets. City of Cincinnati *v.* Lessees of White, 6 Peters, 431. The occupation of the square by the defendants materially affects the enjoyment and value of the property of the complainant. It is an obstruction which the defendants have no right to erect, and can not erect without those mischievous consequences, which, upon equitable principles, should not only be compensated by damages, but prevented by injunction. Attorney-General *v.* Nichol, 16 Ves. 338.

It is in strict analogy to the case of a commoner injured in his individual rights, and the right of complainant to maintain this suit is fully sustained by the case of Coming and others *v.* Lomazze, 6 Johns. Ch. 438. It is not one of those cases of "rights purely public, which are to be enforced in the name of the state, or the officer intrusted with the conduct of public suits." The complainant has an individual interest in this public square, acquired by purchase, and is not a mere volunteer to take charge of the public interest therein. The fee of this public square is vested in the county of Miami for the uses and purposes named and intended on the recorded plat of the town, and for no other use or purpose whatever. 22 Ohio L. 301. Shall the defendants, at this stage of the suit, abandoning the claim of the right which they have set up in their answer, admitting that they are trespassers on the public square, and that their tortious occupation works a special injury to the complainant, now object that the fee of the square has been conveyed to the county, and that the county commissioners only can restrain them from encroaching upon and occupying this public square? Has the complainant no redress for the special

injury he sustains by the tortious occupation of this public square, because the county commissioners may neglect to vindicate the public interest? The complainant has assuredly, by his purchase of the two lots on this public square, acquired an interest and right in all the advantages to be derived from its being maintained as a public square. His remedy, for tortious aggression upon the interests and rights thus acquired, can not depend upon the will of 301] the others. Such a dependence would *destroy his right, for of what value is a right without a remedy for its enforcement? If the defendants intend to avail themselves of this objection, they ought, instead of setting up a claim, in their answer, to the public square, have demurred to the bill. Such an objection should receive no more countenance than one to the jurisdiction of the court. In a case in which the court had obviously no jurisdiction, the objection to the jurisdiction can never be made too late; but where it is doubtful, and the defendant, instead of demurring, has answered in chief, it is too late, on the final hearing, to object to the jurisdiction. Wilson *v.* Cheshire, 1 McCord Ch. 233; Underhill *v.* Van Cortland, 2 Johns. Ch. 369.

GROSVENOR, for defendant:

The principal question of fact to be settled in this cause is, did Manning agree that in case the county seat was not located at Piqua, that he would give the square for a public common, or for any other purpose. The complainant alleges that he did make such agreement; and the defendants deny the obligation.

I believe that no witness has sworn that he ever heard John Manning make such agreement, promise, or declaration. Mitchell comes the nearest to that point of any other; he says it was stated that the square was given for public purposes, and that if the county seat was not located at Piqua, the square was not to remain open, but to be leased for a seminary; witness is not positive that he ever heard Manning say this, but he heard Brandon say so.

The abstract declaration of Brandon, who had no legal title in the land, but acting merely as a hired servant, the surveyor and clerk of Manning, to write title papers for Manning to sign, could not pass the legal or equitable title from Manning.

It appears to have been well understood at the time, that no title could be acquired from Brandon, but that the only legal title

was in Manning, and he must have made or sanctioned such agreement, before any legal or equitable title could have passed; but there is no proof that Manning ever heard Brandon make such a declaration, and Manning himself appears never to have made or sanctioned any such agreement or declaration, but, on the contrary, he steadily *declared said square was for county [302 buildings, and for no other purpose. It is apparent, from the whole testimony, that the only inducement, for reserving the square from sale, was for the purpose of leaving an eligible site for the court-house and jail, and other county buildings; and the placing the county buildings on that square was the only consideration which Manning expected to receive for the ground, and the promise to give the ground for that purpose did not give any interest, either legal or equitable, to any individual. If any shadow of title was created by that promise, it was a conditional equitable interest in the county, and that condition not having been complied with, Manning became again as much the legal and equitable owner of the ground as if no such promise or declaration had ever been made. The reference in the complainant's deed to the public square, and its being so termed on the recorded plat, can only be considered as matter of description and not as creating a title, nor is it to be considered public property, merely because the owner pleased to name it the public square. But if we were to admit that calling it the public square actually made it public property, yet it would not convey any separate title, either legal or equitable, to the complainant. If any title to said square did pass by the descriptive words used in the complainant's deed, and in the recorded plat, it was to the county (for the town was not then incorporated), and that on the condition, that the county buildings should be erected on said square within a reasonable time.

We contend that the complainant has no right to prosecute a suit against the defendants, to establish a right which can only exist in the county, or some other corporate body, and in which he has no separate interest; for if the complainant has this right, every other citizen of the county or member of the corporation has the same right, and the door is opened for endless litigation, to the utter ruin of the defendants. 5 Ohio, 189, 204; 6 Ohio, 102; also, 4 Jacob's Law Dic. 419, title Nuisance.

The complainant alleges that the building of the defendants

on said square is a common nuisance; and prays that the nuisance may be abated and perpetually enjoined. On this allegation and prayer of the complainant, he can have no relief in this court, for if his allegation be true, he has adequate remedy at law. 4 Jacob's Law Dic. 420, 421, title Nuisance. The complainant alleges that 303] Manning agreed *that if the county buildings should not be located on said square, then it should remain open as a public common. Were this allegation fully proved, he would have an adequate remedy at law, and not in this court. 1 Jacob's Law Dic. 517, title Common. With regard to the allegation that the defendants' building on the square is a nuisance, the complainant is wholly unsustained by the testimony, for a decided majority of the witnesses concur in the opinion that the building is an advantage to the town, and that it would be advantageous to the general interests of the town to have the whole square built up.

I believe that no witness has sworn that said square, in any event, was to remain open for a public common, and the defendants positively deny the allegation; therefore, either in law or fact, the complainant has failed to make out the case.

LANE, J., delivered the opinion of the court:

The subject of appropriations for public purposes has of late been frequently under the consideration of courts in our country; and it is now well settled that where lands are dedicated by the owner to any lawful use, public, pious, or charitable, and are used for the object, and in the manner contemplated by the owner, it inures as a grant. The existence of a grantee is not essential to the validity of such dedication, nor is any particular form of words necessary to give it effect. If accepted and used by the public in the manner intended, it works an estoppel *in pais*, precluding the donor, and all claiming in his right, from asserting any ownership inconsistent with such use. Town of Pawlet *v.* Clarke, 9 Cranch, 292; McConnel *v.* Town of Lexington, 12 Wheat. 582; Beattie *v.* Kurtz, 2 Pet. 566; Cincinnati *v.* White, 6 Pet. 432; Rex *v.* Lloyd, 1 Camp. 262; Price *v.* M. E. Church, 4 Ohio, 547; Heirs of Reynolds *v.* Comm'rs of Stark, 5 Ohio, 204; McBride and Hueston, 6 Ohio, 101; Ladd *v.* Sheperd, 2 Str. 1004; Jarvis *v.* Dean, 3 Bing. 447.

It is not unusual for appropriations to be made for some purpose evidently public, where, from the want of certainty, it is dif-

ficult to learn the precise object. To ascertain this object, in this case, the parties attempt to discover the intention of the owners of the town. With this view, the plaintiff proves declarations by them that they intended to provide a site for a court-house, if 304] wanted, and, if not *needed for that purpose, the square to remain open for the town; while the defendants attempt to prove that they designed, if no court-house should be erected upon it, either to resume it or appropriate it to some seminary of learning. No such uncertainty rests on the case before us; for the acknowledgment and record of the town plat (which is the act of dedication, and which, by the operation of section 2 of the statute of 1805, for the recording of town plats [reprinted 22 Ohio Stat. 301], transfers the fee of the land to the county, and secures its use for the purposes designated on the plat), sufficiently defines the object of the grant; and no declarations or presumed intentions of donors can divert it to a different purpose.

It is clear that Brandon's agency was authorized by the proprietors, for they have ratified it in various ways. They have adopted his numbers of the lots, they refer to his plat in their deeds as the "recorded town plat;" they bound some of the lots on the "public square," and the town has been occupied, in conformity with this plat, for twenty-five years. There is no higher evidence of the public appropriation of the streets and alleys of the town than of the square.

The present case is plainly different from any heretofore decided by this court. In Heirs of Reynolds *v.* Comm'rs of Stark, 5 Ohio, 204, the donation was for "county buildings." In Smith *v.* Hueston et al., 6 Ohio, 101, the object of the donation was for "public buildings for the inhabitants of the county of Butler." By these grants estates were vested in the county as a municipal corporation, and became their absolute property. Here the land was set apart as a "public square; the use is raised and defined, *ex vi terminorum*, essentially for the benefit of the inhabitants of the town, the due enjoyment of which will be secured by a court of chancery. 4 Ohio, 547; 5 Ohio, 204.

Objections are raised to administering this remedy, at the instance of these parties, and we are referred to the opinion of the court in one of the above cases (6 Ohio, 102), in which it is said, that "rights purely public are to be enforced in the name of the state or of its acknowledged agents." In that case the injury, if

any, was done to the county, which should be repaired in a suit in its name and at the instance of the proper officers; but the remedy was denied to those plaintiffs because they were volunteers 305] only, having no *individual interest. The judge, however, proceeds, in the report, to show that the bill could not be sustained under the well-established principles applicable to the case before us, that one commoner may prefer his suit to sustain the common interest (2 Pet. 585; Mitford's Pl. in Ch. 145; Ch. Cas. 272; Cooper's Eq. 41; 1 Atk. 282); and that one creditor (2 Ves. 312; 28 Ves. 78; 2 Johns. Ch. 296; 6 Ohio, 112), one legatee (4 Johns. Ch. 619, 303; 3 Johns. Ch. 553; 3 Br. Ch. 229), or one of a great number interested, under peculiar circumstances, and, for convenience, representing the whole (6 Ves. 779; 11 Ves. 429; Prec. in Ch. 592; 12 Ves. 542), may litigate for the benefit of all. This bill is not skillfully drawn; yet it sufficiently appears that the plaintiff is one of the inhabitants of the town, living and holding property contiguous to the square, the value of which is affected by the dedication. He is, therefore, not a volunteer assuming to protect the rights of others; but entitled to this remedy for the protection both of his individual and his common interests. Case remanded to the county, to settle the terms of the decree.

THOMAS NICHOLS *v.* JOHN POULSON.

Plaintiff, on an appeal from a justice of the peace, is confined, in his evidence to the bill of particulars filed before the justice.

The repeal of section 11 of the act incorporating medical societies, of February 26, 1824, making all contracts for services as a physician, *not licensed*, valid, does not revive the contract, and enable the plaintiff to recover for such services, after the repeal; such services being performed during the existence of the law.

THIS cause was reserved in the county of Pickaway for decision in the court in bank.

Judge WOOD stated the case, and delivered the opinion of the court:

In this case a judgment was obtained against the plaintiff in error, by the defendant in error, before a justice of the peace, from which judgment an appeal was taken to the common pleas.

In the common pleas the defendant in error filed his declaration *in assumpsit* for services rendered as a physician, and for board, for work and labor; for goods, wares, and merchandise; for money laid out and expended, and for money *had and [306 received, etc. To this declaration the plaintiff in error filed his plea of the general issue, with a notice of set-off. The cause was tried to a jury, and a verdict and judgment for the defendant in error.

A bill of exceptions was taken by the plaintiff in error, on the trial, from which it appears that the plaintiff below called witnesses to prove services rendered by him as a physician for the defendant below, and boarding and lodging furnished the defendant below, and also an item for housekeeping. To this testimony the defendant objected, because the first three counts in the declaration, and under which the evidence was offered, contained no averment of any promise to pay, and were no counts, and no evidence could be received under them, which objections were overruled, and the evidence admitted.

The bill of exceptions shows further, that when the suit was instituted before the justice, a bill of particulars was filed with the magistrate, and certified to the common pleas with the papers after the appeal; that this bill of particulars contained a charge only against the plaintiff in error for services rendered by the defendant in error as a physician; and that the defendant below objected to the evidence to prove the items for boarding and housekeeping, because they were not charged on the original bill of particulars before the magistrate, which objection was also overruled, and the evidence admitted.

And the trial further progressing to the jury in the common pleas, the bill of exceptions shows that the services rendered by the plaintiff below, as a physician, were as a steam doctor, during the existence of the act of February 26, 1824, entitled "an act to incorporate medical societies," etc.; and that the plaintiff below did not prove himself, on the trial, to be authorized under that law to practice as a physician.

The counsel for the defendant below then moved the court to instruct the jury that the plaintiff below could not recover for the

services rendered as a physician; but the court refused to give such instruction, but did instruct the jury that as the act of February 26th aforesaid had been repealed since the services were performed, the plaintiff below was, in law, entitled to recover. To all of which decisions the defendant below excepted, and has prosecuted this writ of error to reverse the judgment below.

307] *The plaintiff has assigned for error: 1. That the common pleas erred in admitting the testimony to prove the plaintiff's below claim, under the first three counts of the declaration, these counts containing no promise to pay.

We will dispose of the errors assigned in their order as in progress. Counsel have mistaken this declaration; it contains one count only. The pleader has declared for that whereas the defendant was indebted to the plaintiff in the sum of seventy-five dollars, for the work and labor, care and diligence, etc., of the plaintiff done, performed, etc., for the defendant at his special instance and request. Beginning a new paragraph, he again commences, and for that whereas, the defendant was indebted to the plaintiff in other seventy-five dollars, for meat drink, washing, and lodging, found and provided for the defendant at his special instance and request. There are several other distinct paragraphs, for other things, stated in the same manner. No promise, nor any breach, is pretended to be laid, until we are near the close of the declaration. All these paragraphs put together make but one count, and although dressed up with a little too much verbiage, it is nevertheless, at this stage of the proceedings, a good count. If it were bad, however, it was no reason why the court should reject the testimony under it. They should, as they did, receive the evidence, and leave the party to his motion in arrest or writ of error. The court, then, did not err on this point in the case.

The plaintiff has assigned for error, secondly: That the court erred in permitting the plaintiff below to give in evidence, items of amount not contained in his original bill of particulars filed before the magistrate, and certified with the papers to the common pleas on the appeal. This question presents some difficulty; yet I can not say there is any difference of opinion in the members of the court.

The act defining the duties of justices of the peace (sec. p. 24, 175) provides, that in all cases before a justice of the peace, the plaintiff, his agent or attorney, shall file with such justice a bill of par-

ticulars of his demand. To this bill of particulars, the plaintiff is confined, in his proof, on the trial before the magistrate, unless the justice should permit it to be amended. It is the plaintiff's declaration, and it is the notice to the defendant of the cause of complaint against him. There is the same propriety in confining the plaintiff to his *bill of particulars before the magistrate, [308 that there is for confining the parties to their pleadings in a court of record; that neither may be entrapped by any thing of which he has had no notice, and could not be prepared to meet.

Section 42 of the same act provides that where an appeal shall be taken from a justice, the justice shall transmit the bill of particulars, the depositions, and all other original papers, if any were used on the trial before him, to the clerk of the court of common pleas. The inquiry may well be made, for what purpose is this bill of particulars required to be certified up to the common pleas, unless the plaintiff is to be confined to it on the trial? The law does not intend to compel the performance of a vain, idle, or foolish thing, and this would certainly be such, if the plaintiff was not confined to it on the trial in the common pleas. The object of this statute was undoubtedly to confine the plaintiff to the same cause of action on the appeal that he litigated below—and there is reason in this construction. It puts it out of the power of the plaintiff to commence his suit for one cause of action before the justice, and to entrap a defendant, by proving another, as he might, in the common pleas, under a declaration containing the common counts in assumpsit, or in almost any other form of action. The court of common pleas may doubtless give leave to a plaintiff to amend his bill of particulars certified up, but until amended the plaintiff is confined to it by the clear intention of this statute. The common pleas, then, erred in permitting the plaintiff below to give evidence of "boarding and housekeeping" items not charged in his bill of particulars.

The third assignment for error is, that the court charged the jury, as the law was repealed incorporating medical societies and prohibiting persons without license from practicing physic, that the plaintiff below might recover for services as a steam doctor, rendered while that act was in force, although he was not a licensed physician. Did the court err in giving this instruction to the jury? The force, effect, and validity of the provisions of the statute of February 26, 1824, "incorporating medical societies," is.

not denied. If it were controverted, it is fully settled by this court in 4 Ohio, 309-311, that this act, depriving others then not members of medical societies, nor licensed, from the aid of the law in the collection of their debts, making such contract void, 309] and *imposing a fine for practicing for pay, is a constitutional and valid enactment. The only question arising here is, whether the repeal of this statute revives a contract or liability to pay for services, which contract or liability was null and void by the express provision of this statute, when the services were performed. There is, there can be, no doubt that a void contract is never revived; and, certainly, not without an express provision to that effect, which this act does not contain. This claim, then, for services as a steam doctor, performed while the act to which I have referred was in force, was null and void by the provisions of that law, and the claim was not revived by its repeal. In an action on a contract, that contract is to be decided by the laws in force at the time such contract was made. The court below, therefore, erred in their instructions to the jury, that the law being repealed, the plaintiff's claim was revived, and that he was entitled to recover.

The fourth assignment, and the fifth, which only remain, are the same in substance as the third and first, and are disposed of in our remarks on those points.

Another exception was taken on the trial, as shown by the bill of exceptions, that the court were asked to instruct the jury that the plaintiff could not recover below because he had not given evidence on the trial that he was a licensed physician—which the court refused. This decision is not assigned for error, nor is it necessary to be stated.

The judgment is reversed, and the cause remanded to the court of common pleas to be reinstated on their docket, and proceeded in as that court shall be advised.

J. Olds, for plaintiff in error.

Irvin and Caldwell, for defendant in error.

*McCoy's Administrators v. Bixbee's Administrators. [310

Covenant to convey a tract of land, specifying no time of conveyance, and a covenant to pay therefor so much money in hand, and so much at a future day, are mutual covenants.

In such case the purchaser can not have a cause of action, without averring the payment or tender of the purchase money.

This case was reserved here for decision in the county of Delaware. The declaration was in covenant upon an article of agreement, dated August 12, 1811, by which Bixbee, for and in consideration of (McCoy's) covenants thereinafter contained, covenanted to execute and deliver to McCoy a good deed for one hundred and twelve acres of land, without fixing any time for the conveyance; and McCoy covenanted to pay therefor seven hundred and eighty-four dollars, as follows: three hundred and ninety-two dollars on demand, and the balance of three hundred and ninety-two dollars in five years from the date, with interest after eighteen months until paid.

The first count in the declaration avers a general performance by the plaintiffs' intestate, and assigns for breach the non-execution of the deed by Bixbee.

The second avers the plaintiffs' request for the deed, and the defendants' refusal.

The third describes the covenant to convey on request, and avers a request and refusal.

The fourth describes the covenant as one to convey in a reasonable time, which elapsed before May 1, 1830; that a third person then held the legal title, and assigns for breach the non-conveyance.

The article is set out on oyer, and the defendants demur generally to these four counts of the declaration, which is joined.

G. Swan, for the defendants:

Insisted that the covenants were mutual and dependent, or that in any event the payment of one-half the purchase money, and the delivery of the deed, are simultaneous acts, and neither party can recover in such cases without averring performance, or an offer to perform, or making excuse for the non perform-

ance. 1 Salk. 112; Doug. 691; 4 Term, 125; 1 Saund. 320, n. 4; 2 Bibb, 614; 3 Bibb, 290; 15 Mass. 500; 10 Johns. 203; 1 Ohio, 341; 5 Lit. 66; 6 Monroe, 361; 2 Johns. 145; 8 Mod. 68, 381; 2 H. Blk. 123.

P. B. WILCOX, for the plaintiff:

311] *The question is, at what time was Bixbee legally bound to execute the deed to McCoy? Was it a reasonable time after the contract was made, or upon the payment of the first installment, due on demand, or the second installment, due in five years?

No specific day is named in the contract. No mention is made of any event or contingency, upon the happening or not happening of which the conveyance is to be made, such as "upon payment," or "as soon as paid," or "when paid," etc., which ordinarily occur in contracts of this kind. The deed is evidently to be made at some future period, which period is not designated, either by day, month, or year, nor by any future contingency. It would seem, therefore, that this case must come within the rule, that where *no time* is fixed by the parties, the law will fix it for them, namely, a reasonable time after the execution of the contract; which reasonable time, the fourth count alleges, and the demurrer admits, has elapsed. Is not this the only question in the case?

The defendants' argument assumes that these are concurrent acts, to be performed by both parties. What are these concurrent acts? Bixbee covenants to make a deed at some *indefinite period.* McCoy covenants to pay three hundred and ninety-two dollars on demand (which is a time certain, because it can be rendered certain by the party), and three hundred and ninety-two dollars in five years. Now, at what point of time is this concurrency of acts to take place? The defendants' counsel seem to think it should be on the payment of the first three hundred and ninety-two dollars. The only objection to this is, that the contract does not say so, nor anything else authorizing such an inference. The first payment is to be made *on demand, i. e.*, at the convenience of Bixbee, but the contract does not say that the deed may likewise be made at his convenience. The second payment is at the expiration of five years. What is there *in* the contract that looks to the time when the deed is to be made? It is true that abstractly the vendor is presumed to intend to hold the title, until he receives the purchase money, but must not such intention appear, or rather the

contrary not appear, on the face of the contract. In the present case, Bixbee "for and in consideration of the said McCoy's covenants and agreements hereinafter contained," bound himself to convey, etc. If these words mean anything, Bixbee did not intend to rely upon the land as security, but upon the "agreements and covenants" of McCoy. These *words may be [312 *technical* or mere words of course, but in the absence of all others of an opposite character, is it not reasonable to give them their appropriate meaning?

The last clause of the first rule, 1 Saund. 320, n. 4, and page 4 of the note, seems to be applicable. The rule is, "if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or *may* happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such act, before performance; for it appears that the party relied upon his *remedy*, and did not intend to make the *performance* a condition precedent; and so it is where *no time* is fixed for performance of that, which is the consideration of the money or other act."

Upon this principle, McCoy's right of action was perfect, after the lapse of a reasonable time for the execution of the deed, and Bixbee's right of action was perfect for the first installment whenever he chose to enforce it, and for the last installment at the expiration of the five years.

Judge WRIGHT delivered the opinion of the court:

The points raised by the demurrer make it necessary for us to construe the covenant between these parties. Bixbee, in consideration of McCoy's undertaking to pay him for a tract of land, covenanted to convey him the land, without mentioning any time for the conveyance. McCoy stipulated to pay one-half the purchase money on demand, and the remainder in five years, with interest after eighteen months. The common sense construction of this contract, in the opinion of the court, is the legal one. Bixbee did not manifest a clear intention to convey away his land to another, and rely upon the mere promise of the person he conveyed to to pay him for it. Such a contract, or intention, would be so manifestly against his interests, and the common and usual mode of selling land on credit, that the

presumption is against it, and clear expressions are required to authorize such a construction. The consideration of the covenant to convey, is said to be the promise to pay by McCoy. We think this too narrow a construction. The performance by McCoy of his covenants, the payment of the money, was the only real, substantial consideration of the promise to convey by Bixbee. To determine otherwise seems to us the substitution of the shadow 313] *for the substance. Mere words should be construed according to the evident intention of the parties using them. 1 Ohio, 341; 4 Ohio, 593. Why did these parties omit to fix the time for making the deed? Evidently in order to entitle McCoy to the deed whenever he paid his money. He had the option of a credit of the whole purchase for five years unless Bixbee demanded one-half of it before. It would be unreasonable to construe this so as to compel Bixbee to convey away his land without being paid for it, and to rely upon the mere promise of his grantee to pay; and being unreasonable, we can not suppose it was his intention so to contract. As we understand the law applicable to such contracts, it gives no force to technical constructions when opposed to the intention of the parties.

It follows from our opinion that if McCoy, the plaintiff, would show a good title to sue on the covenant of Bixbee, he must aver either that he has paid the money, or that he has tendered, and is ready and willing to pay. That is the condition of the contract upon which the right to sue depends. The absence of such averment, in either count of the declaration, is a fatal objection. The demurrer is sustained.

JOHN G. WORTHINGTON'S LESSEE *v.* PHILIP YOUNG.

Lease for life by husband and wife of the wife's estate, not acknowledged by the wife as the statute requires, is not available against the wife after the death of the husband.

THIS cause was adjourned from the Supreme Court, in the county of Hamilton. It came up on a motion for a new trial. The suit was in ejectment for part of in-lot No. 89, in the city of Cincinnati. The case was submitted to the jury upon the following facts agreed, and the opinion of the court thereon:

It was admitted that Seth Cutter was formerly the owner of the lot, and that he died in possession previous to the year 1812; that soon after his death that part of the lot in dispute, with adjoining property, was set off to his widow, Ann Cutter, for her dower, who soon after married Maxwell Hargraves, *from [314 whom both parties claim title. The plaintiff gave in evidence:

1. A deed from Hargraves and wife to Samuel R. Miller, dated July 26, 1831, including the property in question, and adjoining property.

2. A deed from Samuel R. Miller to the lessor of the plaintiff, and H. G. Phillips and D. Gwynne, dated November 20, 1831.

3. A deed from Phillips to Worthington, including the premises in question, dated February 11, 1832, and adjoining property.

4. A deed from Gwynne to Worthington, including the premises in dispute, dated February 11, 1832.

It was proved that Hargraves died on some of the first days of February, 1833. It was admitted the defendant was in possession. This was all the evidence on the part of the plaintiff.

The defendant gave in evidence a *lease* made by Hargraves and wife to himself, for the premises in question, dated April 26, 1816, not acknowledged. It was also admitted that the lessor of the plaintiff had received rent of the defendant for the premises, as by receipts dated June 13, August 7, and November 21, 1832, and January 21, 1833, which were admitted to be his handwriting. It was admitted that Mrs. Hargraves was still living.

Upon this evidence the jury returned a verdict for the plaintiff, subject to the opinion of the court whether he is entitled to recover.

If the court should be of opinion that plaintiff is entitled to recover, then judgment is to be entered on the verdict; if not, then the verdict is to be set aside and judgment entered for the defendant.

The charge of the court and the verdict of the jury was in favor of the plaintiff. The defendant moved for a new trial.

N. Wright and Fox, in support of the motion:

This is an action of ejectment brought for a part of lot No. 89, in Cincinnati. On trial before the jury, the plaintiff gave in evidence the following facts: That Cutter died in possession in 1806, leaving his widow, since the wife of Hargraves, to whom the lot,

315] with adjoining property, was soon after assigned *for dower, and both parties claim title under her; a deed from Hargraves and wife to S. R. Miller, dated July 26, 1831, including the lot in question, with adjoining property; and from Miller to Phillips and Gwynne, dated November 20, 1831; deeds from Phillips and Gwynne to the lessor of plaintiff, dated February 11, 1832; that Hargraves died some of the first days of February, 1833, and that defendant has been in possession since his lease. All these deeds are part of the case.

The defendant proved his lease from Hargraves and wife, dated April 26, 1816, which is part of the case; and that defendant continued to pay rents to Miller and his assigns up to January, 1833; and that Hargraves' wife is still living. On which proof, on suggestion of the court, the jury returned a verdict for plaintiff, subject to the opinion of the court on the above titles.

The case turns on the legal effect of the lease from Hargraves and wife to the defendant of April 26, 1816. This lease is executed by the husband and wife, under seal, with two witnesses, but not acknowledged; is for the life of the wife for a rent of one hundred and fifty dollars per annum, payable quarterly. If this lease is sufficient as a defense in ejectment, under the circumstances of the case, the defendant is entitled to judgment.

For the defendant we maintain that this lease, under the statute then in force (independent of the question of coverture), is a valid lease at law without acknowledgment, that statute not including leases; that the lease, therefore, is left to operate as at common law; that at common law, a lease by the husband and wife of the wife's property, under seal, is voidable only, that is, valid until it is avoided; that the right to avoid is a personal privilege, to be exercised only by the wife and her heirs, and not by her grantee; that the present plaintiff, therefore, can not avoid the lease, and the wife having done no act of avoidance, it is still valid; and not only so, the wife having conveyed all her interest in the property, and thereby put it out of her power to avoid, the lease has become utterly unavoidable.

It is a case, if we mistake not, peculiarly susceptible of demonstration. We shall briefly state the several propositions on which it rests, and if they are distinctly understood, we do not see how the conclusion can be avoided.

316] *1. In the first place, we say the statute of February 14,

1805, 1 Chase's Stat. 484, in force when the lease was made, does not include leases. In Bisbee's Lessees *v.* Hall, 3 Ohio, 465, this court so decided; and such, we believe, was the uniform understanding and practice under that statute. So general was the usage under it that after the decisions on the subsequent statutes, that acknowledgment was necessary, the legislature found it necessary to pass a law to dispense with the acknowledgment upon short leases.

This construction of the statute of 1805 is very obvious. Section 1 provides that "all deeds for the conveyance of *lands*, *tenements*, and *hereditaments*," etc. Every lawyer who has read Blackstone knows that these terms do not include a lease. So, also in section 2: "When husband and wife shall incline to dispose of and convey the estate of the wife, or her right in or to any *lands*, *tenements*, or *hereditaments*," etc., using the same language, applicable only to a conveyance of a freehold. The words "lease, release," introduced among the forms of deeds, can only refer to the ordinary conveyance by lease and release, for they are followed by the words, "for the lands, tenements, and hereditaments intended to be conveyed," all uniting to show that this description of property only was the subject of the legislation.

The position was once taken that this is not a lease, inasmuch as it runs for the life of the lessor. This is entirely untenable. A lease in common parlance, and in legislative language, as well as in legal phrase, is a contract for the possession of lands. So is this; it creates the relation of landlord and tenant, and leaves a legal estate in the premises in the lessor, that is, a rent issuing out of the property; it is subject to be determined by forfeiture for the ordinary causes, which would leave the entire estate in the lessor. These are palpable and unequivocal distinctions between this and a conveyance of the freehold. 1 Paige Ch. 414.

If it were necessary we might go further, and show that this lease, even if it were within the statute of 1805, would still be a sufficient defense. If such were the construction, then the result would be that a lease, acknowledged under the statute, would be utterly unavoidable; but if not so acknowledged, then we must go to the common law to ascertain the effect of it, that is, to ascertain whether it is utterly void, or voidable only. By statute 32, Henry VIII, c. 28, 4 Bac. 18, a *similar provision is [317 made, by which leases of the property of married women may be made absolute and unavoidable; and still it is held that leases not

executed according to that statute are still voidable only, as at common law. So, here, if the statute included a lease, still a lease not within the statute must be obligatory to some extent. The statute makes them unavoidable; without the statute they could not be utterly void, but voidable only. The consequence would be that on such a lease, though we might not be able to recover in ejectment, still where possession was taken under it, rent paid, etc., it would be a sufficient defense to protect the possession until avoided. 1 Ohio, 253; 3 Id. 296, 298; 6 Pet. 441. It is not necessary to follow out this point in detail.

2. The next position is, that at common law, the lease in question being by the husband and wife, under their seals, is not merely void, but voidable only; that is, is capable of confirmation, and is valid until avoided by some positive act. So the law is laid down in all the books, and we find no case which holds the contrary. Whether the lease of the husband alone of the wife's property, and whether their joint lease without deed are valid till avoided, are disputed questions; the former now pretty well settled in the negative. But those are different questions; as the law now is, a lease by deed, signed by both, is voidable only, and will be confirmed after the husband's death by acceptance of rent by the wife, accepting fealty, bringing an action of waste, etc. 4 Bac. 13–15; Dyer, 916, 159 a. And this both before and since statute 32, Henry VIII, c. 28, Noy's Max. 69. In Goodright v. Straphan, 1 Cowp. 201, Lord Mansfield so states the law distinctly, though he held that a mortgage in form of a lease was void 1 Doug. 53; Cro. Eliz. 112; Westcott's case, 2 Co. 60. So, also, in Doe v. Welles, 7 Durnf. & E. 474, Lord Kenyon states the law the same. 4 Dane's Abr. 330, c. 115, a, s. 26–28. And it is the same whether the lease be for life or for years. 3 Saund. 180, n. 9; 1 Rop. Prop. 89; 2 Com. Dig. 227; Baron and Feme, R. G. 3, s. 1. See 2 Thos. Coke, 507, *433; 4 Cruise, 64*, 87. 1 Rop. Prop. 89, etc., states the law fully on these points.

Some of the reasons for this principle are that the wife's estate may be leased on more advantageous terms, and she may have the more full enjoyment of it. If the lease is merely void, it is
318] void as to all parties, and no rents can be *recovered upon it. In case of the husband's death, the rents in arrear would go to the administrator of the husband, and so also would those accruing after, until eviction by the wife. The wife is fully pro-

tected by the power of avoiding the lease; but an incapacity of making a lease of any effect, so far from protecting her, would be ruinous to her interest. 3 Kent Com. 193; 3 Burr. 1806.

The case of Jackson v. Halloway, 7 Johns. 81, has been cited as containing a different doctrine. This was a lease by the husband only, and so not touching this case.

It will be recollected that prior to the statute of 32 Henry VIII, the lease of husband and wife of wife's lands was voidable only; the instrument was good as a conveyance until avoided. The object of that statute was to make those leases which before were voidable unavoidable, provided they were executed according to the provisions of that act. It had no operation on leases which were not made pursuant to that statute. Hence, it was always agreed that leases executed after the passage of that act, if the lease by reason of any defect was held void as a statutable lease, still it was supported as a common law conveyance. 4 Bac. Abr. 13; 2 Saund. 18 a; 2 Rop. 616.

3. The next position is, that the lease, being voidable only, remains valid until avoided by the wife or her heirs, and can not be avoided by her assigns. The right to avoid is personal privilege designed for the special protection of the person under the disability resting in her sole election, and not transferable by grant. It is so in the very nature of the case, and is a familiar and well-settled principle. 2 Kent Com. 194; 4 Bac. 16; 3 Bac. 607; 1 Rop. Prop. 90; Van Bramer v. Cooper, 2 Johns. 279; Hartness v. Thompson, 5 Johns. 161; Oliver v. Houdlet, 13 Mass 239; 2 Mad. Ch. 560. The cases and the reasoning referred to under the next point also establish this position. With reference to the confirmation of a voidable contract, see Drake's Lessee v. Ramsay, 2 Ohio, 253.

4. We will introduce here another position which arises out of the preceding, serving to illustrate and confirm it. After the wife has parted with all her interest in the premises, she can not avoid her lease, because she has no interest, and her grantee can not avoid it, for the reasons above stated; and, therefore, by such act of alienation, her lease becomes *unavoidable. This is [319 clear from the reason of the case, and so the law is laid down in the books. As in 1 Rop. on Prop. 90, a joint lease by husband and wife will be confirmed by their joining in a fine to a stranger, and this of necessity, as the wife could not exercise her election

after the fine, and the right could not pass to the connusee. 4 Bac. 16. The same would be the effect of a conveyance by the wife after the husband's death, if made before an election to avoid the lease. So, also, if the husband dies, and before an election to avoid the lease she marries again, acceptance of rent by the second husband renders the lease unavoidable. This seems to rest, in part at least, upon the reason that by the second marriage, which is her free voluntary act while discovert, she has vested an interest in another, putting it, for the time at least, out of her own power to avoid. 4 Bac. 16, 17; Cro. Eliz. 152; 2 Com. Dig. 228; Bar. and Feme, s. 3.

It will be kept in mind that our deeds by husband and wife, with the statute separate examination, are equivalent to the fine in England; and, therefore, the conveyance to Miller, in the present case, is precisely the case of alienation by fine mentioned above.

Apply the foregoing principles to the present case. The lease to Young, of 1816, was a valid lease, until avoided; it can not be avoided by any act of the grantee of the wife, nor even by the wife herself after parting with her interest; it therefore still remains valid, and is a good defense in this suit, unless there is some act of the wife amounting to an avoidance.

5. It therefore only remains to inquire whether anything has been done by the wife amounting in law to an act of avoidance.

1. And first, we contend that the wife during coverture can do no act *in pais* avoiding the joint lease of herself and husband. What she may do in court, by suit or otherwise, is not now to be considered. Out of court, the wife, without the husband, can do no act relating to her estate, which is not at least voidable; an act making void a voidable deed, *ex vi termini*, is an act in itself absolute and unavoidable, making certain and absolute a matter which was uncertain and contingent before. The act of avoidance, therefore, can not be itself avoidable. The adjudication of a court upon the election of the wife would be conclusive, and on this 320] principle *rests the validity of a fine; but the election of the wife, out of court, would of itself be nugatory, because merely a voidable act; and therefore the separate act of the wife *in pais*, during coverture, would not avoid the lease.

But again even, if the wife alone could avoid it, still the husband and wife jointly could not. So far as relates to the husband, the lease is undoubtedly valid and binds the estate during his life.

He therefore can not avoid it; and any act by which he and the wife should unite to avoid it, is clearly void as to him; if so, it can not be valid as to the wife. The husband and wife are one person in law, and their joint acts can not have a separate and opposite effect as relates to each other. She could not even act in relation to her estate separate from her husband; it requires both to make a valid act, not both acting separately upon their separate interests, but both uniting as one person. Zanch *v.* Parsons, 3 Burr. 1808; Baxter *v.* Smith, 6 Bin. 429; 2 Rop. Prop. 108. A wife may purchase, and such an act is voidable only; yet she can not avoid it during coverture, though the husband may, if he has not assented to it. 1 Thos. Coke, 153; 4 Cruise 21, 25; 2 Thos. Coke, 252. A guardian, who has assented to a purchase by his ward, can not avoid it, though the ward may, after coming of age. Oliver *v.* Houdlet, 13 Mass. 239.

2. The only act which is claimed to be an act of avoidance by the wife is the deed to Miller. This deed, so far from being an act of avoidance, is clearly an act of affirmance. It will be kept in mind that this deed is duly executed under the statute to bind the wife; and therefore is valid according to its legal purport, as against her estate. Though the husband and wife could not by such a deed avoid the lease, because the husband was absolutely bound by it, still they could confirm it, and make it unavoidable, as they could by the common law have confirmed it by levying a fine.

Let any man read this deed as it would be read by ordinary men, and understood by a plain dealer in a fair transaction. It will be kept in mind that it covers property adjoining that now in question; different tenants were in quiet enjoyment under their respective leases from the grantors, and paying their rents. The deed recites these tenants by name, the defendant among others, refers to them as tenants, intimates no design to disturb them, but, on the contrary, expressly "*reserves their legal rights.*" Would any plain man or woman *suppose, that by such language [321 they were canceling the leases they had previously given, and conferring the power to turn out the very tenants they seem so cautious to protect? And if such is the legal effect, is it not obviously a triumph of skill over inexperience? But is not the legal construction the same as the common sense one? The legal rights of the tenants are reserved. What were the legal rights of Young? Why, clearly to occupy under his lease, until the wife by

some legal act should avoid it. And could the deed in the very language which saved that right put an end to it? This would make the paper speak nonsense. We are willing to concede, for the present argument, that one deed, under proper circumstances, may be an act of avoidance of a prior one, but it must be clearly so intended; the two deeds must be such as can not stand together. In this case no such intention is indicated, but directly the contrary. It would have been the easiest thing possible to express, in so many words, such an intention; but it is not intimated. The two deeds also stand together with perfect consistency. The deed to Miller is appropriate to pass both that part of the ground not under lease, and the rents, with all the interest of the lessors in such as was under lease. There is not the semblance of incongruity. The bare recital of the tenancy in the deed, without gainsaying it, is a clear recognition of the lease; the grantee, by the very act of taking such a deed, takes the tenants as they are; and still it is contended, by so doing, that tenancy was ended.

The case of Jackson v. Carpenter, 11 Johns. 539, 559, has been referred to. That case itself shows the correctness of the above positions. It is put (page 604) entirely on the ground of *intention*. Both deeds were in fee, and could not stand together.

Again, the receipt of rents by Miller, and his assigns from Young, after the deed, not only shows that the deed was not an act of avoidance, was not so intended or understood, but it is of itself an act of affirmance of the lease by the grantees themselves. After thus receiving the rents and assuming the attitude of a landlord toward Young, they could never avoid the lease, even if it was avoidable by them. Not only so, but even if the lease was utterly void as the act of a married woman, and if the statute required it to be acknowledged, still the acceptance of rent under it by Miller and his assigns, constituting the relation of landlord 322] and tenant, ejectment *could not be maintained until notice to quit, or some act determining the tendency.

The lease is dated April 26, 1816, and reserves a yearly rent. Hargraves died about February 1, 1833; the rent was paid up to January 21, 1833. Was not this acceptance of the rent for part of the year a confirmation of the lease for the whole of that year? Could the plaintiff divide the contract, which was for a year, by putting an end to it before the expiration of the year? We suppose not. And yet we find that the defendant is served with a

declaration in ejectment on April 10, 1833, which was sixteen days before the expiration of that year in which the plaintiff had received three quarters rent.

The doctrine of notice, therefore, applies peculiarly to this case. If a tenant for life lease lands, and die, the lease of course is valid as to the remainder-man; yet if the remainder-man receive rent, although the reception of rent (the lease being void) will not be a confirmation of the lease, yet it will be sufficient to establish a tenancy from year to year, and notice to quit will be necessary. Adams on Eject. 108. So of a lease void by the statute of frauds and perjuries, payment of rent, although it will not establish the lease, yet the receipt of it will create a tenancy from year to year. Adams on Eject. 108; 2 Cow. 660. So where the party comes into possession under a lease invalid for any other reasons, it will be good as a tenancy from year to year, and require notice. Adams on Eject. 108, 109; 9 Serg. & R. 87.

Now, if the act of transfer of Hargraves and wife to Miller could be considered as a disaffirmance of the lease, as is contended by plaintiff, the subsequent receipt of rent created the tenancy from year to year. If that act was not a disaffirmance of the lease, if the lease was only voidable, then the mere death of Hargraves could not of itself avoid it. Some act of Worthington was necessary to show his intention to avoid, and hence notice to quit was indispensable previous to the bringing the suit.

Admitting the right of election to have been transferred by Hargraves and wife to Miller, and by Miller to Phillips and Gwynne and lessor of plaintiff, and that at and before Hargraves' death, it was vested in lessor of plaintiff, the act of receiving rent for part of a year was the recognition of a contract for the occupation of the whole of the year. "The *moment the tenant [323 is suffered by the landlord to enter on the possession of a new year, there is a tacit renovation of the contract for another year; and notice must be given." 4 Kent, 112; Adams on Eject. 114. The whole doctrine of notice is laid down in Kent with his usual clearness and discrimination.

It will be remarked that Worthington was under no legal disability of making a contract with Young. Admitting he had the right to avoid the lease at the death of Hargraves, his accepting rent on account of the accruing year was an election to have it continue at least for the year. He stands, therefore, in a very

different situation to what Mrs. Hargraves would have stood had she retained the estate.

If, then, this was a contract from year to year, a notice to quit must have been given previous to suit brought, and it must have been a reasonable one. 4 Kent, 112, 113, n. *d*; 2 Pick. 71. If notice is necessary, therefore, as there was no pretense of notice having been given, judgment must be for defendant.

But again, if the act of plaintiff's lessor, in receiving rent for part of a year, is evidence of a contract from year to year, as the books say it is, then it is perfectly immaterial about the giving of notice, for the law would not suffer Mr. Worthington to recover possession until the expiration of the term, which could not have taken place until the 26th April; and yet the demise is laid on March 1, 1833, and declaration served April 10, 1833, so that it is impossible for the plaintiff to recover.

We contend, further, that the law will not permit any person claiming under Maxwell Hargraves to recover against this lease. It is very certain that Maxwell Hargraves could not have recovered during his life. The deed being only for a leasehold estate, neither witnesses nor acknowledgment was necessary. 3 Ohio, 465. If, then, Hargraves could not have recovered, could he do any act to enable another to recover? It will not be contended, however, that Hargraves could have recovered, but it will be insisted Mrs. Hargraves could have avoided the lease after his death, and that she having passed her title, her grantee can do the same. But is this so? Can the present plaintiff recover at all without claiming under Hargraves? It is very clear he can not. Mrs. Hargraves' deed to Miller was a perfect nullity without the assent 324] and concurrence of Hargraves, the husband. It is the *joint deed of husband and wife, and was perfectly void, as a statutory deed, without their both joining. If, then, the plaintiff claims under the deed from Hargraves, he is estopped from claiming against Hargraves' deed. He can claim nothing which Hargraves could not claim.

We are not now discussing the power of Mrs. Hargraves to avoid the deed after Hargraves' death; that question does not now arise, because she has done nothing since her husband's death to avoid or confirm the deed. The rights of the plaintiff depend upon the efficacy of the joint deed of Hargraves and wife, and we say, if Hargraves was estopped by the former lease, his grantee stands in

no better situation. The error of the plaintiff consists in their assumption that they are claiming only under Mrs. Hargraves, and in the supposition that the rights she would have had to avoid the lease are transferred to them. They can not get along, however, without claiming under Hargraves; and if they had claimed under him alone, they would admit they could not recover. The plaintiff is now claiming directly contrary to the deed of his grantor. Where a party is estopped by his deed, all persons claiming under him are also estopped. 7 Conn. 212. If we are correct in claiming that the present plaintiff can not recover unless Maxwell Hargraves could have recovered, then we consider it well settled that no man can be permitted to recover contrary to his own grant. 12 Johns. 204; 1 Johns. Cas. 90; 1 Ohio, 412.

We do not contend that Mrs. Hargraves, or any other married woman, can be estopped because she is not capable of making a contract which will estop her, but the husband is under no disability; and when the plaintiff can not show title without claiming under one who is affected by an estoppel, his title is bad.

Again: if the lease was voidable only at common law, but was within the statute of 1805, so that acknowledgment was necessary it would still stand as a valid lease in equity until avoided by the wife; and possession being held under it, and rents accepted, most clearly the tenant can not be dispossessed, at least without notice.

We can not perceive any view of this case by which this lease can be valid between the date of the conveyance to Miller and the death of the husband, which will not make it valid to the present time. That deed was the joint and valid *act both of the [325 husband and wife considered as one person, necessarily operating the same way as to the interests of both; and if, after that conveyance, the lease was in force as to one of them, it must have been in force as to both; and if it was in force as to both, it is still. There could be no affirmance of it in part: the act of Worthington in receiving the rent was a recognition of the validity of the lease at the time of receiving the rents; it was a confirmation for the time being, and if confirmed for one hour it could not be subsequently disaffirmed.

6. There is another view of this case, which ought to be mentioned. If the lease could be brought within the statute of 1805, so that acknowledgment would be requisite, still, in equity, the lease would be valid till avoided; and if not avoided, the tenant

has at least an equitable right under it, and the clause in the deed, "reserving to the tenants their legal rights," would be an exception of the lease out of the deed; so that the deed would confer no right of possession, interfering with the right of this tenant; it would be a grant subject to, or reserving his right of possession, and on such a grant this ejectment can not be sustained, unless it be to compel the tenant to attorn, which is not claimed. It is no answer to this, to say that "*legal* rights" only are reserved, not *equitable* ones. The term *legal rights* will not receive such a restricted construction. It means lawful rights, for in that sense the word is always used in common language, and in legal language also, unless it is placed in direct contrast with equity.

We have one general remark to add. There is in the foregoing one chain of propositions, which seems to us, when put together, to amount to demonstration, and on which, therefore, we must rely. There are also several independent propositions, which, standing alone, seem to us to sustain the defense; but we have not enlarged upon them, because it seemed unnecessary; but if we are mistaken upon other points, we trust they will not be overlooked. On the whole, the technical law of the case we think will be found to accord with its equity and justice.

STARR, for plaintiff:

The premises in dispute, being the estate of the wife, could only be conveyed according to the provisions of the law in 326] *force at the time. Section 2 of the act of February, 14, 1805, which was in force in 1816, required that "any grant bargain and sale, *lease*, release, feoffment, deed, conveyance, or assurance, in the law whatsoever," by which the estate of the wife in lands and tenements was to be conveyed, should be acknowledged by the husband and wife before a certain officer designated in the statute. Witnesses are not made necessary by this section; but acknowledgment by the husband and wife, and examination of the latter by an officer, are made necessary. Land Laws of Ohio, 307.

It may be thought, perhaps, that the terms *lease* and *release*, as used in this section, though separated by a comma, refer to the mode of conveyance under the statute of uses, denominated "lease and release." Be this as it may, it is apparent that every

kind of conveyance, which professes to alien the estate of the wife, comes within its provisions.

But it may be said that Hargraves, the husband, having the *usufruct* and the sole right of possession during coverture, might dispose of it for the time being, in the same manner as he could dispose of any estate in lands which he held in his own right—that as a leasehold estate, independent of statutory provisions, might have been created by writing, without deed or acknowledgment, or attestation of witnesses, the conveyance of April 24, 1816, is not embraced by section 1 of the act alluded to, which requires "*all deeds for the conveyance of lands*" to be acknowledged and attested by two witnesses.

The writing of April, 1816, is not, properly speaking, a lease, because it parts with all the interest of the grantors—it leaves nothing in reversion—it is the conveyance of a freehold estate, which can only be granted by *deed*, and for the same reason, the estate of Hargraves could be conveyed only pursuant to the first section of the act. 12 Johns. 73; 2 Ohio, 213; 5 Ohio, 190.

It is not necessary, however, to decide whether the writing of April, 1816, was a valid conveyance of the estate of Hargraves during the coverture; it is sufficient to say that it had no effect after his death. It will hardly be contended that it operated as a conveyance of the estate of Mrs. Hargraves after the death of her husband. There being no acknowledgment or examination before the proper officer, no estate *belonging to her exclu- [327 sively passed by it; it was a mere dead letter. 7 Johns. 81.

A grant by husband and wife, of the wife's lands, not acknowledged by her, only passes the interest of the husband, and every covenant by her, in relatien to the title, is absolutely void. 10 Johns. 435, 441; 10 Johns. 110; 8 Cowen, 227; 6 Wend. 9; 17 Johns. 167; 15 Johns. 483.

In 16 Johnson's Reports, Judge Spencer observed that the conveyance, although signed and sealed by the wife, was not her deed until she had acknowledged it according to the statute. *It could not bind her as a contract.*

Chancellor Kent says, though a wife may convey her estate by deed, she will not be bound by a covenant or agreement *to levy a fine*, or *convey* her estate. 2 Kent Com. 141.

The agreement of a *feme covert*, with the assent of her husband, for the sale of her real estate, is absolutely *void* at *law*, and the

courts of equity never enforce such a contract against her. 5 Day, 492.

We consider the writing, therefore, of April 24, 1816, as having the same effect precisely, and no other, as if Mrs. Hargraves had not signed and sealed it.

It will probably be contended that the lease by Hargraves and his wife, of April, 1816, to the defendant, is good for her natural life, unless she do some act after his death to avoid it; and that having joined with him in the deed to Miller, of July 26, 1831, she is incapable of disaffirming it, or doing any act impairing the title of the defendant, acquired under it. It is on the truth of this proposition, we presume, that the defendant principally, if not entirely, relies.

If the lease be absolutely void as to her (as we contend it is), it is a solecism in language to say that an act of *disaffirmance* was necessary to avoid it. It became void on the death of her husband, and no act of *affirmance*, short of acknowledgment and examination, could have made it valid.

But it will be said that 4 Bacon, title Leases, letter C, lays down the law to be, that if a husband, seized of lands, in right of his wife, makes a lease of them, reserving rent, it shall be a good lease for the whole term, unless the wife, by some act after her husband's death, show her dissent thereto; also, if she join in lease of her lands, but not pursuant to the statute of Henry VIII, it 328] could only be avoided by a similar act of *dissent after his death. How the English decisions, under this statute, can be pressed into the service of the present case, we are not able to perceive; for it only authorized leases by husband and wife of the wife's lands in which she was seized of an estate of inheritance, either in fee simple or fee tail, and for three lives or twenty-one years, and with certain reservations of rent, etc. If anything is to be derived from the English law to aid the present case, it must come from the common law. In 1 Shep. Touch. 280, it is stated that at common law if the husband make a lease of his wife's lands, and die, it is void; so if husband and wife make a lease of her lands, it is void after his death. Woodfall, Landlord and Tenant, 75, uses the language of Bacon, word for word, and then adds, if a widow chooses to avoid such lease, notwithstanding her having joined therein, it is so absolutely void as to her, on the husband's death, that she may plead *non demisit*, because, as to any

interest that passed from her, she did not demise. In Bro. Leases, 24, it is said, that if a husband seized in right of his wife, lease her lands, and die within the term, the lease is void by his death. The authorities cited by Bacon, do not support the position he assumes. They are examined by Williams, in his edition of Saunders' Reports, Wolton *v.* Hele, 3 Saund. 180, n. 9, and he comes to the *sage* conclusion that, upon the whole, the law is not so *clearly agreed* as it is said to be by Bacon. Without undertaking *tantas componere lites*, it is sufficient to say that there was no acceptance of rent, in this case, after the death of Hargraves, either by his widow, or the lessor of the plaintiff, or any other act on their part, indicating an intention to affirm the lease; and all the authorities seem to concur that mere *non-feasance* will not make the lease valid—that some positive act of *feasance* is necessary to make it effectual. Even Bacon adds, that if the wife accepts rent which becomes due after the death of the husband the lease thereby *becomes valid*, clearly intimating that *something must be done* to make the lease good for the whole term. No authority intimates that it is necessary to take any steps to avoid the lease after the death of the husband, but that it may be affirmed by some act, such as the acceptance of rent. It may be safely assumed, therefore, that all the rights of the defendant, under the lease in question, ceased upon the death of Hargraves.

But we do not deem it important to decide whether, according *to English authorities, a lease by the husband of the wife's [329 lands, or a lease by husband and wife of her lands, not executed pursuant to the statute of Henry VIII, be void or voidable; or whether it be necessary for her to do any act after the death of the husband to avoid it; or what acts by her will have the effect to avoid it.

It is sufficient for the present purpose that the lease of April 24, 1816, to the defendant, owing to its imperfect execution by Mrs. Hargraves, did not operate to convey her estate in the premises after the death of her husband; that it would be competent for her to reclaim the estate were it not for the deed to Miller of July, 1831, which places it out of her power; that it is competent for the lessor of the plaintiff to do it, as he claims the estate under her; that the right to avoid a voidable deed is not confined to the person making it, but pertains to any one claiming the estate

under such person; that bringing ejectment is the most significant act of avoidance that can be expressed. Perkins, sec. 12; 2 Saund. 180, n. 9; 14 Johns. 127; 11 Johns. 541; 1 Shep. Touch. 233.

The case of Jackson, ex dem. Campbell and Read, *v.* Halloway, 7 Johns. 81, bears directly upon the question before the court, and, in my opinion, decides it. In that case a husband made a lease of his wife's lands regularly executed by *him*. Ten years after the husband and wife made a lease of the same lands to another person, which was duly *acknowledged by her*. After the death of the husband the wife accepted rent from the first lessee, or rather the assignee of the lease; yet the court decided that it was not such a confirmation of the first lease as to divest the title of the second lessee; that it was not in her power to do any act impairing his title; that the real estate of a *feme covert* can be conveyed in no other way than that prescribed by the statute; that analogies derived from the statute of Henry VIII, or the common law, do not come in to regulate it.

The case of Martin *v.* Dwelly, 6 Wend. 9, before referred to, involves principles, it appears to us, perfectly decisive of the present question. In that case a husband and wife made a conveyance of *her* lands by *deed*, but not acknowledged. The consideration money was paid, the grantee took possession, and made valuable improvements. After the death of the husband and wife the heirs 330] of the latter brought ejectment. *The purchaser filed a bill in equity praying that the heirs of the wife might be decreed specifically to perform her contract—release to him their title, and be enjoined from prosecuting their ejectment. The chancellor allowed an injunction, but upon hearing dissolved it. The court of errors, after a most elaborate investigation of the subject, and a critical examination of the authorities, affirmed the decision of the chancellor. Equally decisive of the question before the court is the case of Butler and Atwater *v.* Buckingham. 5 Conn. 492. The defendant in that case, Mrs. Buckingham, as the widow of a former husband, Joseph Bryan, had a right of dower in a particular lot of land of which he died seized. After her marriage with Buckingham they executed a penal bond to Butler and Atwater, conditioned to make them a deed for the lot, who took possession of it, made improvements, and retained the possession more than twenty years. Upon the death of Buckingham, his widow brought her action to recover the possession of Butler and Atwater, who

thereupon filed a petition in chancery for injunction and specific performance. Upon demurrer to the petition, it was held by the court that the whole system of the common law was opposed to the doctrine on which it was founded; that it was a fundamental principle of the common law that the contract of a *feme covert* is *absolutely void*, except where she conveys her estate by fine duly acknowledged, or by some matter of record, when she is privately examined, in order to ascertain whether such conveyance is voluntary on her part; and it is pertinently said, how absurd, then, would it be to enforce such a *contract to convey*, made without such examination! It would be saying that a *feme covert* can not directly convey her real estate unless she be privately examined; and yet she can *contract to convey* without such examination, and such contract will be enforced against her. By this mode the established law in relation to a *feme covert* and her real estate will be completely subverted.

We commend these two cases and the principles they contain to the special attention of our opponents; and if further argument be not made useless by conviction, we know not what is demonstration

It has been said that the deed made by Hargraves and wife to Miller, in July, 1831, confirms the previous lease made to the defendant by reason of the following clause contained in *it: [331 *Saving to the said tenants now occupying under the grantors their legal rights.* This is not an exception or reservation. 1 Shep. Touch. 78–80.

It is not easy to perceive how a conveyance of the lot itself to Miller, secured it to the defendant, by reason of the above clause, because he had a previous lease so defectively executed that he could not hold by virtue thereof, especially after the death of Hargraves. It would, in effect, make the defendant to take by the deed to Miller, rather than Miller himself. No one, not a party to a deed, can take anything by it, except by way of remainder. 9 Johns. 75.

It is a just conclusion, we think, that if the tenants had no *legal right* to the possession of the premises, it was not intended to confer one. Their *then* legal rights were saved—no *new* ones given. On a former occasion it was contended that the lessor of the plaintiff could derive no title under the deed from Hargraves and wife to Miller, because it was the conveyance of a freehold estate to

commence "*in futuro*," and, therefore, void. We do not so understand it. It is a conveyance in *præsenti*. A fact extraneous to the deed, which prevents the grantee from getting possession till some time after the delivery, does not bring it within this rule. The estate must be limited by the terms of the deed to vest at a future time. The reason of the rule is obvious. Besides, a deed of bargain and sale, founded upon a pecuniary consideration, is good, though to commence *in futuro*. 20 Johns. 81; 1 Johns. Cas. 21; 2 Saund. 96, n. 1. Chester *v.* Willan.

The success of the plaintiff in this suit has been questioned, because the lease, *as it is said*, contains a covenant on the part of Hargraves, that the defendant should have peaceable possession of the premises the whole term, and that such covenant is a bar to an ejectment by all persons claiming under him. There is no express covenant to that effect, and if any be implied, it is found in the word *rented*. The word *lease* is not in the instrument. Without spending time on this point, we leave it to those who make it to sustain it. 2 Caine, 183; 2 Cowen, 36; Ohio, 190.

Since the preceding was written we have seen the printed argument of Messrs. Wright and Fox, with their comments on ours.

332] In 3 Saund. 180, n. 9, it is said that if husband *and wife make a lease of her lands by deed, and she accept rent after his death, she will be bound by it at common law. So, too, of a lease made by them, since the statute of Henry VIII, but not pursuant to it, because, by the receipt of rent after the husband's death, the lease is affirmed; but that, in either case, she may avoid it by *bringing ejectment;* and, for this purpose, the authority was referred to. It is not intimated that any act was necessary to avoid it prior to bringing ejectment, being of itself the most emphatic act of dissent that could be expressed.

The cases in 11 and 14 Johnson abundantly support the position for which they were cited. Infants had made deeds for certain lands. After adult years they made deeds for the same lands to other persons, who avoided the deeds made in infancy, by ejectment against the persons claiming under those deeds.

In the latter case it was made one of the grounds of defense, that no one but the infant himself, or his representatives, privies in blood, could avoid a conveyance made by him. Judge Spencer, in delivering the opinion of the court, in answer to this objection,

says Perkins, section 12, states the law to be, "that all gifts, grants, or deeds—made by infants, by matter in deed in writing, which do take effect by delivery of his hand—are voidable by himself, his heirs, and those who claim his estate;" and Lord Mansfield, 3 Burr. 1804, says this is the rule; and Shepherd in his Touchstone, page 233, lays down the same rule, thus admitting, with respect to voidable deeds, that a privy in estate may avoid an infant's deed. 14 Johns. 127.

The argument for the defendant assumes that when this suit was commenced, he was the tenant of the plaintiff from year to year, and, therefore, entitled to notice to quit; and yet that notice would have availed nothing, because the year did not expire till sixteen days afterward. According to the law of Ohio, notice to quit previous to bringing ejectment, is not necessary. 2 Ohio, 265.

But when and by what means did this *new* relation of landlord and tenant between the parties come into existence? Was it upon the *first* acceptance of rent, by the plaintiff, of the defendant? Or was it on April 24, 1832, and because Hargraves *happened* to die before April 24, 1833, and because the plaintiff received rent of the defendant *during that year? The supposed relation [333 does not exist, unless there has been a surrender of the lease either in fact or law. The argument for the defendant asserts no surrender of the lease; on the contrary, it insists upon its validity, and that he has still a right to retain the possession of the premises by force of it. Notice to *quit* is not necessary when a lease is determinable upon a certain event, or at a particular period, though the time of the happening of the event be unknown and contingent. Woodf. L. & T. 175; 7 Cowen, 637.

The law fixed the determination of the lease at the death of Hargraves with the same certainty as its terms fixed it at the death of his wife. But the rent was paid to January 21, 1833; and it is asked, was not this acceptance of the rent for part of the year a confirmation of the lease for the whole of that year? We answer, no more a confirmation of the lease for the whole of that year than it would have been if Mrs. Hargraves had died instead of her husband. We have not time to pursue this argument, and leave it to the court.

N. Wright and Fox in reply:

Since writing the foregoing, we have been put in possession of

Mr. Starr's argument. He insists the deed which we call a lease is no lease, because it parts with all the interest of the lessees. The definition of a lease shows the fallacy of this argument. Woodfall's Land. and Ten. 1. But Hargraves and wife did not grant their whole interest; they reserved a rent, and this is generally the criterion of lease or no lease.

We do not deny the authority of 7 Johns. 81. In that case a lease has been made by the husband only; afterward another lease was executed by husband and wife, and it was held this lease put it out of the wife's power to affirm the first one. But the decision rests upon the distinction that by the common law a parol lease, not in writing, was void, and, of course, a lease by deed of the husband only must be void as to the wife; but the judge recognizes the validity of a lease by deed of husband and wife, until it is disaffirmed by the wife after her husband's death.

The authority, Woodfall's Land. and Ten., cited to show this lease void, does not sustain the plaintiff. On the contrary, on page 76, it distinctly recognizes the validity of the lease until the wife's actual dissent or disagreement.

334] *The author of the Touchstone does not support Mr. Starr. He only says if husband and wife had joined in a lease of her lands, *without rendering of rent*, the lease is void; or if the husband had made a lease of his wife's land, *rendering rent*, and died, the lease is void. So if he had made a lease by *word*, rendering rent. But he distinctly recognizes the validity of a lease by deed, such as we show by referring to the very authorities which we cite. Touchstone, 280, 281.

The authorities cited do not support Mr. Starr in the position assumed, that the right to disaffirm pertains to all and every person to whom the estate is transferred. The cases in 11 and 14 Johns. only sustain the position that making a new deed by an individual after he arrives at age is an act of disaffirmance of one made while a minor. The page referred to in Shepherd does not touch the case. 3 Saund. 180, n. 9, certainly does not prove the position assumed. But it does prove, most positively, the position that a lease by deed of husband and wife of the wife's lands is good, until avoided by the wife after the husband's death.

The case in 7 Johns. 81, we have before remarked upon. The case in 16 Johns. 110, only decides that a deed in fee of a *feme*

covert is not perfect as a deed until acknowledged. 8 Cow. 277, same principle.

We do not contend that we can take by Miller's deed, but we say the language of that deed must determine what was intended to be conveyed to Miller; and if it had been the intention of Hargraves and wife to have avoided the leases, they would have said so, or at least they would not have attempted to reserve to us that which it was their object by the deed to destroy. The words demise, lease, let, grant, etc., have been decided to be words of warranty. 2 Caines, 194, 195.

Upon the whole, we conceive that our argument is not affected by the reasoning of Mr. Starr. We consider this lease as being a voidable lease at the election of Mrs. Hargraves, after her husband's death; that no person but her or her heirs could avoid it; that she has not avoided it since her husband's death, and that she could not avoid it by any act during coverture; that if the transfer of the estate to Miller gave him and his assigns a right to avoid it, they have not done so, but have by acceptance of rent confirmed the lease; that as the plaintiff claims under Hargraves and wife, and has no *claim only through Hargraves, he is af- [335 fected by the lease in the same manner Hargraves was affected, and that Hargraves could not have avoided this lease; that if Worthington could have avoided the lease after Hargraves' death, he could not do it until the expiration of the current year for which he had received three-quarters' rent, and that notice to quit must have been given.

Judge LANE delivered the opinion of the court;

The plaintiff shows a plain legal title to the premises, and is entitled to recover the possession, unless the defendant can retain it under a lease from Mrs. Hargraves, made whilst she was a married woman, such lease not being acknowledged nor accompanied with the fact of a separate examination. The defendant, not controverting the general proposition that the interests of a *feme covert* in lands can not be passed in such forms, endeavors to retain the estate under this conveyance by the following reasoning: because, in a lease executed by husband and wife, the acceptance of rent by the wife after the death of the husband is an affirmation of the lease that renders her liable on its covenants, consequently it is inferred that such lease is voidable, not void, and valid until

avoided. Here no act of avoidance is shown, therefore the estate of the tenant is not determined.

We do not admit this conclusion. It is the policy of the law to regard a married woman's contracts, except those made in certain prescribed forms, as absolutely void. The case put, 4 Bac. Ab. 14, presents no exception to the rule. The lease acquired efficacy by the payment of rent to the wife after the death of the husband, not because the acceptance secures as the confirmation of a voidable contract, but because it testifies her assent to an agreement when competent to contract. It is a ratification which supplies the deficiency of a pre-existing authority.

No such assent is shown in the present case: the estate of the defendant, therefore, terminated with the life of the husband. The motion for a new trial is overruled, and judgment entered for the plaintiff.

336] *ZENAS KENT AND OTHERS v. LUCIUS V. BIERCE AND OTHERS.

It is not necessary on the dissolution of an injunction and dismissal of the bill, where the injunction did not operate, to stay execution upon a former decree or judgment, to sue execution against the complainant, before a suit can be sustained on the bond against the securities.

Payment of costs of original bill no bar to the action on such bond.

An injunction may be continued on the complainant's application, upon the terms of giving a new bond with new security; and if such be the terms of the order, the first bond is discharged.

On general pleadings court can not take any cognizance of the commencement or termination of the terms of a court of law.

A joint demurrer to two pleas—one held good, judgment goes for the party pleading the pleas. Amendment allowed.

THIS case was adjourned here for decision from the county of Portage. The action was debt upon a penal bond, subject to the condition that Bierce (one of the defendants) had obtained an injunction in chancery restraining the obligees from erecting a meeting-house on two lots in the village of Ravenna; and if he should fail to prosecute his bill to effect, and pay all damages,

losses, or injuries the obligees might sustain by reason of the injunction, the bond should be void.

The plaintiffs assigned the following breaches under the statute:

1. That the bill of injunction was dismissed in the Supreme Court at the complainants' costs.

2. That before the injunction the plaintiffs had procured materials for building the meeting-house, and employed workmen, who had been and were actually engaged upon said building, and was prevented by the injunction from continuing the work from that time until the dismissal of the bill, whereby the labor and materials were injured and lost, to the amount of seven hundred dollars.

Pleas: 1. That the court of common pleas, while the cause was pending there, and after the date of the bond, by interlocutory decree, ordered the injunction continued upon condition that Bierce give bond as an indemnity and security to the plaintiffs, if the injunction should be dissolved, in the place of, and as a substitute for the bond declared upon; that in pursuance of the order, bond was given, with sureties, in the penal sum of one thousand five hundred dollars, conditioned to be void if the injunction was dissolved, which bond was delivered and accepted in place of, and as a substitute for, the bond declared upon.

2. That the decree dismissing the bill of injunction was against the complainants therein for costs only, without further *or- [337 der, and that the defendants have since paid the costs in full of the decree.

To these pleas there is a general demurrer which is joined.

C. Pease, for the plaintiff.

The first plea we hold insufficient, because the order of the court to give additional security did not vacate, satisfy, or cancel the first bond; nor can the court, by a mere order, cancel the deed of a party; it can be done only by the act of the obligee, expressly releasing or otherwise canceling it.

But if this were otherwise, I see no reason why the first bond should be vacated by the second, any more than special bail by appeal bail, or appeal bail by bail on an injunction; they are additional security; and what principle of law, justice, or equity forbids holding both bonds in force, when the united penalties might be insufficient to indemnify the injured party?

But, certainly, to make the second bond a satisfaction of the first, it ought to be accepted as such by the obligee; this he has not done. It does not appear from the plea who accepted it, but the inference is that the clerk did it. This can not destroy the right of the obligee, nor can there be a tacit acquiescence, because the order was made at the October term, 1831, and ought to have been immediately complied with as a condition precedent to the continuing of the injunction, but it was shuffled off to the 15th of February following, as appears by the plea. The obligees had no opportunity to make any obligations until the spring session of the court, when it would have been perfectly useless to set up a clamor about an insufficient bond, after the other party, by his chicanery, had obtained his object of continuing the injunction.

A debt may be merged in a higher security taken for the same debt, but not extinguished, for it exists in the new security; but a debt can not be merged or extinguished by taking a new obligation, when that new obligation is designed for additional security, and not the satisfaction of a liquidated debt.

The second plea is insufficient, because it does not answer the whole declaration; it makes no answer to the damages sustained in consequence of the injunction, which is the gist of the action. 338] It neither denies, nor confesses, and avoids *them. Now, if it is competent to secure by an injunction-bond a compensation for the damages which a party may sustain by reason of an unjust and vexatious injunction (and who can doubt the equity, policy, or legality of such security), then the bond in suit is one which deserves the countenance of the law. The plea, that they have paid the costs decreed, is no answer to our claim for a compensation for damages.

The subject of consequential damages was not before the court of chancery; there was no allegation in any part of the pleadings or proceeding by which that subject was in issue, or presented to the notice of the court. It was no part of the case, although a consequence resulting from those proceedings. It is provided for by contract, and the remedy is plain and adequate at law.

In what manner should chancery proceed? Should they, on the suggestion of the defendant that he had sustained damage, refer the matter to the master to take evidence and report upon whatever happened to appear, without any statement of facts or

pleadings to guide him? When will it terminate? The damages may be constantly accruing. If referred to a master, he can not report in advance, before the damages have accrued, and what accrues after taking the evidence and before the decree would not be provided for, unless the master was directed to make supplemental inquiries, and then he could never undertake his case. If the court should direct a supplemental or cross-bill to be filed, stating the facts which constitute the damages, and a new series of pleadings to bring the matter fairly and understandingly before the court, shall the injunction-bond be made part of the case and the sureties brought in as new parties? If so, it will be a new way of giving chancery jurisdiction in actions of debt, and would, in fact, be a new case with the parties reversed. If proceeding against the original complainant alone is had to get the damages assessed by a master, in order to bring suit at law on the bond to charge the securities, this would be no great saving of time, or expense, or multiplicity of actions; and, it may be asked, would the securities be bound by such an assessment of damages, or could they claim their constitutional right of a trial by jury? Such a course of proceedings would be novel and absurd in the extreme. The damages, although a consequence of the chancery proceedings, are totally *de hors* the case. They form a new and distinct subject of controversy, in form *ex contractu*, *for which the law [339 furnishes a complete and adequate remedy, and a jury is the proper tribunal to decide the *facts* and assess the *damages*.

P. Hitchcock, for defendant:

The first question raised by the pleadings in this case, is, whether the declaration of the plaintiffs is sufficient in law? In this state the most material rules of practice, both in law and chancery, are established by statute. If, in any respect, these rules are variant from the English rules, the latter must give way. Either in chancery or at law, a cause may be removed from the common pleas to the Supreme Court, by appeal. But the appellant is required to give bond with security to the opposite party. The condition of this bond makes the obligors liable for the amount of the decree or judgment in the Supreme Court, upon the contingency that the appellant fail to satisfy the judgment or decree. Under what circumstances, then, or at what time will the obligor have a right of action upon the bond? It was formerly

held that he might have an action immediately upon the rendition of the judgment or decree, and it is still so held with respect to a bond, conditioned to prosecute a writ of error. 5 Ohio, 175. The legislature, however, considering it unjust that bail should be made liable, while the principal was perfectly responsible, in the session of 1826 and 1824, enacted, that before suit should be brought upon such bond, an execution should be issued against the appellant, and if, upon the return of said execution, it should appear that the principal person, against whom the judgment or decree was entered, has not property from which the same could be satisfied, then suit might be commenced upon the bond. Chase's Ohio L. 1302. A similar provision is found in the revised laws of 1831; 29 Ohio L. 108.

This law was intended to correct an evil supposed to exist in practice, of sustaining suits upon appeal bonds, before an effort had been made to obtain payment from the principal debtor. Declarations upon appeal bonds, previous to the enactment of this law, were required to set forth not only the bond, but the judgment; it seems to me to follow, that since 1823, it is necessary to set forth that an execution has been issued and returned no goods, chattles, lands, or tenements. The law says, that this "*shall*" be done, and the fact that it has been done, constitutes a part of the plaintiff's right or title to recover.

340] *I am aware that special bail is not liable until a *ca. sa.* has been returned *non est.* And I am further aware that it is a point which has been much controverted, whether it should be alleged in the declaration against special bail; that the return of *non est* had been made upon a *ca. sa.;* or whether it would be matter of defense that it had not been done. Should the court incline to the opinion, that such would be merely matter of defense, it can make no difference as to the proper form of action upon an appeal bond. This bond is required by a statute, which provides that no suit shall be commenced upon it, until there has been an execution, and a return of no goods, etc.

If I am correct with respect to appeal bonds, the same rule applies to injunction bonds. Both are put upon the same footing by the legislature, and I presume will not be separated by the court. Before suit can be sustained upon either, an effort must be made by execution to enforce the judgment or decree. In this case, although the suit is upon an injunction bond, there is no allega-

tion in the declaration that any effort has been made to enforce the decree, nor is there even an allegation that the principal debtor has, in any respect, failed or refused to comply therewith. And should a judgment be entered for the penalty of the bond, that judgment would be discharged by a compliance with the original obligor in the Supreme Court, and the payment of the costs of this suit, 29 Ohio L. 108. From these considerations, I insist that the declaration is defective, and shows no right of action.

It is argued that section 27 of the judgment and execution law, applies only to bonds given to stay proceedings on judgments at law. What is the language? "In *all cases* where judgment shall be rendered in the Supreme Court against the appellant, or an injunction dissolved in the court of common pleas or Supreme Court, the successful party shall, before he brings suit upon the appeal or injunction bond, issue execution against the principal debtor," etc. The legislature have said in "*all cases.*" Where does the counsel for the plaintiff find authority to interpolate between the words "injunction" and "dissolved," the words "to stay proceeding upon a judgment at law." Is it in the expression that "execution shall issue against the principal debtor?" If any inference could be drawn favorable to the interpolation from these words, it is *rebutted by a subsequent clause of the [341 section, which provides that, even after judgment rendered upon the bond, that judgment "shall be discharged by the payment of the original judgment or decree," etc. But no such inference can, with fairness, be drawn. After a decree, either for the payment of money, or the payment of costs, the individual against whom the decree is made, becomes a debtor. He is "the principal debtor," and against him the execution must issue.

The whole subject of injunctions is provided for in the act regulating the practice in chancery, commencing at section 41 and closing at section 50, 29 Ohio L. 87. But a careful examination of all these sections will show that there is nothing to interfere with the construction I insist should be given to section 27 of the act regulating judgments and executions. It is true, that by these sections no bond is absolutely required, except where the object is to stay proceedings at law. But section 50, which authorizes the judges to allow injunctions where it is usual for courts to interfere in this way, authorizes it to be done upon such condi-

tions as the judges making the allowance may think proper to prescribe. And if the condition prescribed is, that a bond shall be executed, the bond thus executed becomes an injunction bond, and the obligors must be made liable in the same manner with other obligors who have signed injunction bonds.

If I am right, with respect to the declaration, there is an end of the case; but as the court may differ from me in this, it is proper for me to proceed to the consideration of the pleas.

The first plea alleges, that during the pendency of the case in chancery, to wit: at the October term, 1831, of the court of common pleas, the court, as a condition upon which the injunction should be continued, made an order that the complainant in chancery should enter into bond with security, to be approved by the clerk of the court, in the penal sum of fifteen hundred dollars, "*in place of, and as a substitute for*" the writing originally executed, and upon which this suit is brought, etc.; and that the defendant did enter into and execute such bond as was directed by the court.

Now, it seems to me that the only question presented by the demurrer to this plea, is whether a court of chancery has power to make an order or decree like the one therein named? If the court possesses the power, then the plea is sufficient. If not, the plea is no defense.

342] *My friend, Judge Pease, can not have examined this plea with his usual sagacity. He speaks of an order of court, to give "additional security." No such order is stated. The order set forth is an order that the complainant should enter into bond, "*in place of, and as a substitute*" for the one originally executed. The only object of the court seems to have been to compel the complainant to give a bond in a larger amount, not as an *additional* security, but as a *substitute* for the security previously given. Whether it was or was not *necessary* that the second bond should vacate the first, is out of the question. So long as it was given as a "substitute" for it, it must have that effect.

It is objected to this plea, that it contains no allegation that the second bond was received by the obligor in satisfaction of the first. To this I reply that such was not the order of the court. As between two individuals, it may be admitted that the second bond must be received in satisfaction of the first before it will operate as a bar; but this case is entirely different. It is not a matter of

contract between two parties. View it in whatever aspect we may, it is a question with respect to the power of a court of chancery.

I agree, that although it is the peculiar province of chancery to order contracts between parties, when a proper case is made, to be given up and canceled, yet it would be an arbitrary act of power to order this to be done without sufficient cause. And as we are bound to believe it will not be done without such cause, it is, perhaps, not going too far to say that it can not. But an injunction bond, as in this case, is entirely different from the ordinary case of a bond given by one person to another in the course of business. It is not delivered to the obligor, nor does it in fact become his until there is a final disposition of the injunction. It remains in the custody of the officer of the court, and may or may not become available to the obligor, according to circumstances. There may be a change of circumstances which would require a bond for a greater amount, and may not the court order it? Another change may render it proper that the amount should be less, and may it not be reduced? And, if the amount is increased, must the new bond be "additional" and not as a "substitute?" Suppose the case should be such that the defendant in chancery should move for an increase of the bond and the court should make the order, can he afterward complain that *the [343 order is wrong, as interfering with the contract? And, therefore, that a bond given at his own request shall not operate as a substitute, but merely as additional security? There seems to be some absurdity in such a course of reasoning. If, in any possible case, the court might make such an order, it will be presumed that case has occurred in the present instance. In other words, this court will not presume that the court of common pleas have done wrong when, by possibility, they may have done right. But, in principle, I can see no objection to this course of practice. The bond is, at most, but a part of the proceedings, and, like the other proceedings, is within the control of the court. It is not required by statute, but merely at the discretion of the judge allowing the injunction. Where the injunction is to stay proceedings at law, the amount of the bond is fixed by statute, and the court or the judge making the allowance could not fix upon a less sum. But even in such case, if there should be any doubt as to the security first taken, there can be no question but the court might and would, on motion, and as a condition for continuing the injunc-

tion, order that new security should be given, which, when given, would operate to discharge the old.

The second plea sets forth in substance, that after decree made in the original case in chancery, the defendant complied with and performed that decree as by the condition of his bond he was bound to do.

This plea again presents the question which I have discussed upon the insufficiency of the declaration. If under section 27, of the judgment and execution law, a compliance with the decree would discharge a judgment rendered for the penalty of an injunction-bond, surely such compliance before suit brought, must be a bar to any action upon the bond, and if so, this plea is sufficient.

It is objected, however, that this plea does not answer the whole declaration. The plaintiffs seek to recover damages for loses sustained, as they say, in consequence of the chancery proceedings, and as to these damages the plea says nothing. Was it necessary? Take the ordinary case of an injunction to stay proceeding at law. The creditor may have sustained damages in consequence of being delayed in the collection of his money—damages far exceeding the amount of debt, interest, and penalty. Yet he can recover nothing beyond this—nothing in this state, beyond what has been 344] decreed him by *the chancery court. In this case, it is possible that the plaintiffs may have sustained damages, beyond the amount of the costs decreed to them in the original suit; but since that decree has been made and complied with, can they recover those damages? We suppose, that if such damages were sustained, the fact should be ascertained and the amount liquidated by the chancellor, and a decree entered accordingly. This amount would have been secured by the bond, and in a suit upon it, the decree would be conclusive as to the sums for which execution should issue.

Counsel for the plaintiffs entertain the notion that these damages are to be recovered in a distinct suit, brought upon the bond, and in which no reference can be had to the original chancery proceeding, any further than to ascertain whether the injunction has or has not been dissolved; and something is said about the "absurdity" of a chancellor's inquiring into the amount of damages a man may have sustained. I will not say that there is absurdity in the course proposed by the other side, but it strikes me

there is difficulty in it. The condition of the bond is not only that the complainants in chancery shall indemnify the opposite party against losses, but that they shall comply with the decree of the court. In declaring upon such a bond it would be necessary to mingle matters of record with matters *in pais*, which might, by possibility, create confusion. I do not perceive the force of the remark, that a "master could never overtake his case," or how there would be any more difficulty in his doing it than there would be with a jury. The injury is complete when the injunction is dissolved, and when this is done the extent of that injury can be ascertained either by a jury or by a master.

The whole matter is resolved into a question of practice, and that course should be adopted which will lead to the most speedy and complete attainment of justice, always being careful, however, that no positive rule of law is violated.

When a case is before a chancellor, propriety requires that anything and everything therewith connected, should so far as can be done, be settled by him, and the rights of all concerned ascertained. Take then a case like the present. An injunction is allowed to prevent a person from doing a particular act. But as the party to be restrained may sustain a loss, in consequence of that restraint, the opposite party is required to give bond conditioned 345] to indemnify him against such loss. *Eventually this injunction is dissolved. Can not the chancellor enter such decree as will, in connection with the bond, indemnify the party upon whom the injunction operated? The only objection is, that damages can not with propriety be ascertained in chancery. True, if the original object had been to recover damages. In such case the court would have no jurisdiction. But the case being properly before the court, there is sufficient power vested in the court to do what equity requires. If damages have been sustained, a master can ascertain how much. If this be not the most eligible course, the case can be sent to a jury under a feigned issue for the purpose of informing the conscience of the chancellor. And in either way right and justice will be done.

PEASE, in reply, contended:

That section 27 of the statute has reference only to decrees for the dissolu tion of injunctions against judgments at law, particularly those provided for in section 44 of the chancery act. Against

whom, he asked, must the execution issue by virtue of said section 27? *The principal debtor.* What is meant by the *principal debtor?* Surely not a complainant against whom costs alone have been decreed.

The provisions for allowing injunctions are all contained in those sections of the chancery act cited by Judge Hitchcock. Sections 41 and 42 provide for staying waste and judgments at law; 43 requires bonds; 44 what decree to be rendered; 48 and 49 punish the defendant for disobedience; 50 allows injunctions in all proper cases on equitable terms and conditions; and section 3 gives the courts full power to establish all proper rules and regulations.

I can find no rules laid down in our statutes, by which the defendant in chancery can have any specific redress for the damages sustained in consequence of an injunction to stay waste, to prevent the sale of lands, or to collect rents, to build houses, mills, or do any other ordinary business, by which he sustains a loss. And why is it not done? The answer is obvious. The principles of the common law are amply sufficient to give the adequate and appropriate redress by a suit upon the injunction bond. The whole case will be spread before the court by the pleadings, by which they will be informed what facts are in issue to be tried. And the legislature must have considered it the safest course to leave 346] the parties in all such cases to their *remedy at law. It is more beneficial for the securities, as they have an equal chance with the principal in making a defense, which they might not have if the principal is first to be tried, and the securities only brought in afterward to foot the bill.

If this is orthodox doctrine, why delay a suit on the bond to recover the damages which have accrued, and to which the obligee has a just right from the moment the injunction is dissolved, until an attempt can be made by execution to collect a bill of costs which may not amount to the hundredth part of the damages, especially when the plaintiff claims nothing on account of the costs, and which attempt may be defeated by the complainant by paying off the costs before execution?

Counsel endeavor to sustain the first plea upon the strength of certain expressions set forth in the order of court, that the new bond should be "in place of and as a substitute for" the bond in suit Should the court think this sufficient to sustain the first

plea, we have humbly to ask leave of the court to reply thereto, for the plain and simple reason, that the order of court is a very different thing and contains no such expressions, nor would it, if they had made profert of it, as they ought to have done, sustained their plea; but I can hardly believe the court will sanction such doctrine.

When the first bond was given and the injunction granted, the injunction was the consideration of the bond and the obligee being restrained in his natural and legal rights, became interested therein the obligation was his property. From that moment he had a vested right, which it was not in the power of the court to divest him of upon a mere order without his consent. It is not like a recognizance of bail, which is matter of record and the act of the court. This is a contract, the act and deed of the obligors. How often has the Supreme Court, when an appellant wanted to introduce his appeal bail as a witness, and offered to substitute other and better bail in his place, refused the application on the ground that it was out of their power to cancel a bond as they might a recognizance.

How appears this proceeding by the plea? The court ordered a continuance of the injunction, on condition of the complainant giving a bond of fifteen hundred dollars as an indemnity and security to the respondents, to the acceptance of clerk, etc., which was delivered to and accepted by the clerk and no one else.

If it is not competent for the court to cancel a bond without the obligee's consent, without a bill filed for the purpose, and if *they can not constitute the clerk of the court his agent to [347 do it for him, then this bond is not canceled. Besides, as I stated in opening, it does not appear that the order of court was complied with. The court can not from anything stated in the plea, ascertain whether the second bond was any indemnity or security to the defendants in chancery; they will not take the defendant's legal conclusions, but judge for themselves from the facts stated; the tenor and condition of the bond ought, therefore, to have been set out.

The order to continue the injunction, must have been made at the instance of the complainant; but whether the condition annexed to it proceeded from the application of the defendant or the kind and provident care of the court, does not appear, nor is it any way material, especially since it has not been complied with.

Judge WRIGHT delivered the opinion of the court:

The first question discussed involves the inquiry, whether a suit upon an injunction-bond can be sustained without averring that execution had issued against the principal debtor, for the sum claimed. By section 27 of the act regulating judgments and executions, 29 Ohio L. 108 (identical with the act in force when this bond was taken, 2 Ch. O. Stat. 1302), it is provided, that in all cases where judgment shall be rendered in the Supreme Court against the appellant, or an injunction is dissolved, the successful party shall, before he brings suit upon the appeal or injunction bond, issue execution against the principal debtor; and if it appear by the return, that he has not sufficient to satisfy the execution, he may then commence suit upon the injunction bond, and take judgment for the penalty, which may be discharged on the payment of the original judgment or decree, with interest and costs. It is urged that the provision so changes the common law rule, that a declaration upon an injunction bond does not show a right in the plaintiff to sue, unless it contain an averment that execution has been issued and has been returned.

What class of cases was in the contemplation of the general assembly in enacting this law? Evidently those where the relation of creditor and debtor subsisted, and as to which a judgment or decree was had on which an execution might issue. The provisions requiring an execution against the principal debtor, and for 348] discharging the bond on paying the original *judgment or decree with interest and costs, make this clear to our minds; but they do not stand alone. The chancery act contains express provisions for three classes of injunction. 1. To stay waste. 2. To stay proceedings at law, before or after judgment, 29 Ohio L. 87. 3. In all other cases where it is usual for courts of equity to interfere by injunction, 29 Ohio L. 89.

There is no limitations in our statutes upon the issue of the first class of injunctions, and their issue is regulated by the common usage of chancery. In the second class, it is provided, that the injunction shall not operate until bond be given with security conditioned for the payment of all money and costs due or to become due in the suit or judgment enjoined, and all moneys decreed against the complainant in case the injunction be dissolved; and if the suit enjoined was for the recovery of money only, the court on dissolving the injunction is required to decree the plaintiff at

law the amount he received at law, with interest and costs and five per cent. penalty. The court in allowing the last class of injunctions (which embraces the one in controversy), is authorized to impose such conditions upon parties obtaining them, as shall seem equitable. Our chancery courts are authorized to enforce compliance with their decrees for the payment of money by the common process of execution issued by the courts of law. Where the injunction operates upon a money demand and delays its payment, it is without effect, except security be given for the debt, and the costs to accrue with interest, in a penalty to cover contingencies. When the party was so abundantly secured, the legislature seemed to think a slight protection to the security called for, and provided that in case the bond become forfeit, the obligee should, as he had a judgment already against the person in equity bound to pay, first take his execution against him, exhaust his property, if he had any, and only resort to the bond, by suit against the security, in case of failure to make the money. Bonds given under our laws to remove causes from the courts of common pleas, after judgment, by appeal to the Supreme Court, are required as security for the judgment to be recovered in the appellate court. The injunction and the appeal both operate to delay creditors, in cases where the amount has been reduced to certainty by judgment, and is capable of execution by the usual process. These two cases were, therefore, not only on the same footing in reason and the nature of things, but, in our understanding, are *the only two classes em- [349 braced in section 27 of the judgment and execution law referred to. By no other construction can we give effect to the obvious intention of the legislature. This view is strengthened by the consideration that suits on appeal and injunction bonds are coupled together in the section; that it is required, upon judgment recovered in the appeal case, on dissolution of the injunction, where judgment had been before recovered, and execution stayed, that execution shall be first issued against the principal debtor. This can not have been intended to embrace a case of injunction to stay waste, or any other kind of injunction than one restraining a recovery at law, because, in such case, there would be no judgment upon which to issue execution. But it is urged that the legislature has expressly provided that in all cases of injunction or appeal, the execution shall issue against the principal debtor, and that it would oppose the plain and obvious meaning of the words used,

to limit them so as to except any case from the general provision. The proper answer to this is, that courts are not to presume the legislature intend to require an impossible, vain, or useless thing to be done; or impose a limitation to the remedy upon a legal obligation, that would defeat the very object for which it was executed. It would be useless, if not legally impossible, to issue execution when there was no judgment or decree; and if without execution, the obligee of an injunction bond is without remedy, the only object of the bond, security to a party from damage by the injunction, is defeated. We, therefore, construe the act as if it read, in all cases of injunctions where there is a judgment at law, or decree for a sum certain, an execution shall issue on the judgment or decree before suit is brought upon the bond.

The distinguished counsel, who has argued this cause for the defendants, seems himself pressed with the difficulties of the construction he advocates. The statute expressly provides for the discharge of the injunction bond in the cases contemplated upon the payment of the original judgment or decree. It would seem to follow that cases, where there was no original judgment or decree, were not within the view of the law-maker. Yet the law authorizes injunctions in cases where there is no original judgment or decree, upon such conditions as shall seem to the court equitable. It seemed to the court of common pleas equitable to allow the injunction in the case under consideration, upon bond 350] and surety, to indemnify the enjoined *party from injury to result from the interruption of his business, in case it should be adjudged by the court that he was right. The injunction is dissolved, and no other decree is rendered than simply a decree for the costs of the suit, which are paid. The injury against which the bond was intended as indemnity, is collateral to the inquiry in the injunction suit, and remains unnoticed in the decree.

Counsel admits it possible that in such cases injury may be sustained beyond the costs, but urges that, inasmuch as they were not included in the decree, it is too late to ascertain and recover their amount in the suit on the bond. It is, indeed, the usual method of ascertaining the extent of injury in the common law courts; but if one of the conditions of the bond sued upon, refer to an injunction allowed by a chancellor, the rule, it is urged, is to be departed from. To avoid the palpable injustice of limiting such bonds to the mere payment of taxable costs, to the exclusion of the prin-

cipal matter intended to be secured, it is urged that they must be assessed by the chancellor with the aid of a master or a jury, and a decree entered for the amount, and execution issued before resort can be had to the bond. This method is unusual. It is less convenient to assess damages in chancery than at law. It would seem less just to the security on the injunction to assess the amount to be recovered of him, in the chancery suit to which he is not a party, and thus conclude him, than to leave the question open and offer him an opportunity to litigate, and see that the amount is fairly and truly adjusted in the suit on the bond to which he is a party. Besides, th e matter is not within the case made in the proceedings and issues, and if inquired into, would require a new and supplemental proceeding. If, therefore, we were to admit that the chancellor might have pursued the course suggested (though upon that point we do not intend to express an opinion) the objection by sureties, that a course of proceeding least advantageous to themselves had not been pursued, would challenge little favor. Moreover, the law does not require of the chancellor to assess damages in such cases; it is unusual and inconvenient to do so; it was not done in the case under consideration. The court, adopting the common usage of chancery, dissolved the injunction, and left the parties interested to litigate and adjust the matter at law. In doing so, we suppose the rights of the parties to the bond were not effected, but left to be governed by the rules of the common law.

*The next question arises upon the third plea. It sets up [351 as a bar to the suit the payment of the costs decreed in the chancery suit. If we are right in the view taken of the declaration, that it is not essential to the plaintiff's title for him to aver the issue of an execution against the principal obligor, then the matter of this plea does not reach the entire action, but looks only to a portion of it. It is not directed to either breach assigned, and of course, if it neither answers the right set up in the declaration, the execution and legal obligation of the bond, it must answer the breaches assigned, or one of them, or be bad as a bar. The breach is, that the injunction was dissolved and the parties injured by the loss of labor and materials. It is no answer to this to say the obligor paid the costs decreed, paid a sum which it is not urged he withholds.

The remaining question regards the sufficiency of the first plea, which is, in substance, that while the chancery suit was still pending

after the date of the bond declared upon, the court continued the injunction upon condition that another bond should be given in a larger sum, as an indemnity to the respondents, in "*the place of, and as a substitute*" for the one declared upon, which was so delivered and accepted. Counsel for the plaintiffs argue, upon this order for a new bond, as if it was described to be for mere *additional security*. It is not so. The allegation is, that the order was made and the new bond delivered and accepted as a substitute for the first one. If the court had power to make the order for a new bond, it was in fact delivered and accepted as a *substitute for the old one*, and we do not perceive how the old bond can be held obligatory. We deem it within the province of a chancellor, in continuing an injunction, to require *additional*, or *new* security, or a bond with *new* and *enlarged* conditions, calculated completely to indemnify the parties affected, if the injunction be finally adjudged to have been allowed without right. Having the control of the papers and parties in the case, the most familiar province of a chancellor is to do complete justice between the parties, and power can not be denied in making the interlocutory order preliminary to the final decree short of what is yielded to him in pronouncing the final decree.

But it is said the court has not the power to accept the second bond as a satisfaction of the first, that none but the obligee, the person having the legal interest in it, can discharge it. So far 352] from this being true, we all know it to be *an undisputed head of equity jurisdiction to order the surrender of deeds and other instruments, to cancel them against the will of the obligee, and to compel obedience to the order by imprisonment, if need be. The plea asserts the order for the bond to be one for a substitute, and the acceptance of the second bond to have been in lieu of the first. This the demurrer admits to be true. If, therefore, such order could be legally made, and the bond was executed and accepted according to the order, the question is at rest. It is said the acceptance is averred to have been by the clerk, and not by the obligee. That is true, and such was the order of the chancellor as set out, to give to the acceptance of the clerk, and the fact does not affect the case.

It is still further objected to this plea, that it alleges the order made at October term, 1831, as a condition precedent to the continuance of the injunction, and the bond not executed until Feb-

ary following, and therefore the bond was not given in compliance with the order. This objection supposes this court can take judicial notice of the length of the October term of the common pleas in 1831. How can we know the term, commencing in October, did not continue until February? By the allegations of agreement of the parties to the suit, we have neither in the case before us. If such, however, was the decretal order, the objection would fail for the reason given, and for another one, that the plea avers the bond was given in compliance with the decree. If the facts vary from those alleged in the plea admitted true by the demurrer, the plaintiff must open some other way for considering the objection than the one before us.

We think the declaration and the first plea of the defendant good. The second plea we hold to be bad. But the plaintiff has demurred jointly to both pleas, and as one is good, the rule in such cases overrules the demurrer, and entitles the adverse parties to a judgment. There is, however. an application for leave to amend. Leave is given the plaintiff to withdraw his demurrer, and reply on paying all the costs since filing the demurrer.

353] *Eleanor Connell v. Samuel Connell.

To bar the dower of a wife by a deed, executed under the act of 1805, it is necessary that the certificate of acknowledgment should show the wife was made acquainted with its contents.

This cause was adjourned for decision, in the court in bank, from the county of Belmont. It was a bill in chancery, in which the complainant claimed dower of the defendant in real estate sold by her husband, now deceased, in his lifetime, and conveyed to the defendant. The matter reserved arose upon the form of acknowledgment in a deed. This acknowledgment was in these words:

"Personally came John Connell and Eleanor his wife, before me, John Barrett. one of the justices of the peace for said county, and acknowledged the within indenture to be their voluntary act and deed, for the purposes therein expressed; the said Eleanor, when being privately examined, separate and apart from her hus-

band, acknowledged that she signed the same of her own free will, without any compulsion from her husband, and so freely relinquished her right of dower."

HUBBARD and COWEN for complainants:

The question in this case is, whether the certificate of the justice on the back of the deed on file states all the facts relative to the acknowledgment, and knowledge of the contents of the deed, by the complainant that must be proved to bar dower.

As to the argument of counsel, based upon the supposition that there may be an equitable right in the defendant to the dower interest, the complainant capable of being enforced in a court of equity without a legal right, good at law, it is believed that it needs no argument to illustrate its fallacy. A bill in chancery to compel a widow to the specific performance of an executory contract made while she was *feme covert*, would be an anomaly in the United States, and in that country from which we have derived our principal notions of law and equity.

When this deed was executed, and at the date of the certificate of acknowledgment, the *act for the execution and acknowledgment of deeds* of February 14, 1805, was in force. See 8 Ohio L. 398. By 354] that act, if the principle that the law must *be substantially complied with to bar dower, prevails to constitute a good and operative relinquishment of dower by a *feme covert*, the *feme* and her husband must seal, deliver, and execute a deed for the premises, and after such execution appear before a judge, etc., and acknowledge the same—that is, the sealing, delivering, and execution: and the officer taking the acknowledgment must read or otherwise make known to the wife the full contents of the deed, and examine her separate and apart from her husband, and upon such separate examination she must declare that she did voluntarily, etc., seal, and as her act and deed deliver, etc. And of these acts of the officer and declarations of the grantor there must be the official certificate of the officer on the back of the deed.

We take for granted in this case that nothing is competent to prove any of these facts but the justice's certificate, and that those facts which that certificate does not prove never had an existence in judical contemplation.

The certificate in this case proves that the husband and wife, when present together, acknowledged the deed, by the style of an

indenture, to be their voluntary act and deed for the purpose in the deed expressed, and that the wife, on her separate examination, acknowledged that she signed the deed freely, and so freely relinquished her right of dower.

It does not prove that the justice read or otherwise made known to her the full contents of the deed. It does not prove that on her separate examination she declared or acknowledged that she sealed or that she delivered the deed. If the certificate does not prove either of these facts, it is most clear that there has been no operative relinquishment of dower.

It is said that the wife acknowledged the deed to be her indenture—that this proves the acknowledgment of the sealing. But this declaration was not when she was separate from, but present, and jointly acting with her husband.

It is said that the possession of the deed by grantee proves the delivery. This may be a good answer to the fancied objection that there has been no delivery. But it is no answer to the real objection that there is no evidence that the wife, upon her separate examination, declared that she freely delivered it as her act and deed. The fact of a delivery of the deed is not sufficient. The law requires that the wife, on her separate examination, shall declare that the act of delivery, which must have been previously performed, was on her part free and voluntary.

*Again it is urged, that the acknowledgment that she "so [355 freely relinquished her right of dower," proves the delivery. The principle contended for is, that a declaration of what is intended by an act determines the legal effect and operation of the act—that to declare, that by signing without sealing or delivery, you mean to convey a legal title to real estate is, with the signing, equivalent to the sealing and delivery. This principle has not been and never can be recognized as law, and it is believed that unless it is, the position mentioned can not prevail.

The law requires that the wife should declare that she freely signed and delivered the deed. The proof to this point is, that she declared that she signed it, and so (thus, in this manner, by such signing) freely relinquished her right of dower. This only proves that she acknowledged the signing of the deed—it proves no other act; what else is said is of the effect and consequence of that act, what she by signing did.

What is stated about contracts making the law, can have no ap-

plication to this case; nor can we suppose that if one thousand other widows have not relinquished their right of dower, or have relinquished it, that this court will, instead of administering the law as it is, assume the business of legislation, and make a new or alter the old law.

In the case of Brown *v.* Farran, 3 Ohio, 154, Judge Burnet, in delivering the opinion of the court, says upon the question, how far the magistrate may deviate from the words of the act, that "his certificate must contain the substance of every thing required by the law, no substantial part of the provision can be dispensed with." He further says, as to the rules to be observed in construing the certificate of acknowledgment, that "it must appear expressly, or by irresistible inference from the language of the certificate, that the wife was acquainted with the nature of the deed, that she was examined apart from her husband, that she acknowledged the deed, and admitted that it was her voluntary act, in such terms as necessarily excluded the influence of fear or coercion."

It is difficult to perceive any objection that could be made to the principle of law, and the rule of construction here given. What the law has made necessary to be done, must be proved to be done; and where the law has made an official certificate the necessary evidence of a fact, no other evidence can be received, and no presumptions can arise to supply any defect in the evidence.

356] *It certainly does not appear expressly, that the substance of what the law requires has been done. Does it appear by irresistible inference, that the complainant was acquainted with the nature of the deed, that when examined apart she acknowledged the deed, or the sealing and delivery? Not only this, but it might be unanswerably asked, if, by the most liberal construction of the words of this certificate, it can be forced to convey any such facts?

The question is put by counsel, will the court under the circumstances say, that the sealing was obtained by fraud and violence? We answer that there is no evidence before the court to prove that the complainant ever put her seal to the deed. Nothing will prove this but the official certificate of the justice. Without it, so far as the complainant is concerned, it is as a blank paper.

George W. Thompson, for defendant:

Dower is an equitable right, and in this state is only enforcible

in equity, and whatever is an equitable bar should be a good defense. The execution of a deed, and the acknowledgment of the relinquishment of dower, although it may be informal, bear upon the face of them the evidence that the full consideration has been paid for all rights and claims pertaining to the land. In this state the doctrine has been held by some that the statute regulating the taking of these acknowledgments is directory and must be complied with. We do not see any difference between them and the execution of any other deed. And if a deed in this state has been executed without a due reference to the directory provisions of the statute, still does not that deed give the vendee such a right that he can enforce in equity a specfic performance of the contract according to the original intention of the parties. What is the difference here: the husband has received the full consideration for the land, and it has passed to the benefit and use of his family, and may have been invested in other property, out of which the widow is now enjoying dower. The court must be satisfied of certain facts, and although those facts are not certified in a proper and statutory manner, still, if they are so certified as to show a fair and full intention to relinquish dower, we presume it is all that the law requires, and we are certain it is all equity can demand.

*But supposing the case of Brown v. Farran, 3 Ohio, 154, [357 narrows us down to a more strict and technical construction of the statute, we deem that we are within the equity of that decision. The certificate bears upon the face of it the declaration of those facts which are necessary for our defense. It contains evidence that she knew the character of the instrument which she signed, and the consequences to herself which were to flow from her act. She acknowledged it to be an indenture (the highest instrument known to the law which an individual can execute), and an indenture can not be perfect until it is written out, signed, and sealed. And an acknowledgment "of the within indenture to be her voluntary act and deed for the purposes therein expressed," is an acknowledgment within its terms of the signing and sealing. And supposing that this would be stretching the meaning of the terms, "indenture," and "act and deed," beyond their legitimate use, will the court say, that although the signing was fairly obtained, and testified to by witnesses and the justice

of the peace who took the acknowledgment, still that the sealing was obtained by fraud and violence.

It is objected there is no delivery. It is a legal presumption that when a deed is executed, and the possession of the deed is in the vendee, that it is not an *escrow*, but that it is operative for all the purposes intended. It is one of those facts which speaks more conclusively, than any other form of words can do. But is there not on the face of this acknowledgment the certificate of a sufficient delivery—"and so freely relinquished her right of dower?" The language here is very broad, and taking the word "relinquish" in its technical and proper sense, or in its more popular meaning, it will embrace the "delivery," as there could be no relinquishment of her dower without it. Would it not be doing extreme violence to the justice of this cause to say, no delivery had taken place, when from the rules of law and the language of the certificate, no other presumption is properly inferable?

It may be true that "the law makes the contract," but it is also true that "contracts sometimes make the law." And when there has been an inveterate use, the court will respect the rights and immunities which have grown up under it. And I think we may safely say, that considering the time when this acknowledgment was taken (1812), it is unusually full and correct.

358] *Lane, judge, delivered the opinion of the court:

The certificate of acknowledgment, in this case, does not state that the wife, the present complainant, was made acquainted with the contents of the deed; nor does it state that she sealed and delivered it, unless this can be gathered, by implication, from the terms "she acknowledged the within indenture to be her act and deed," which acknowledgment she is certified to have made conjointly with her husband.

The statute of 1805 regulates the acknowledgment of this deed. A construction was given to this statute, in the case of Brown v. Farran, 3 Ohio, 140, referred to by the counsel on both sides in this case. In that case, it is held that the certificate of acknowledgment must show, either in express terms, or by necessary implication, a compliance with every substantial requisition of law. Before the rights of the wife to lands are affected, section 2 requires. 1. A separate examination, 2. That the wife be made acquainted with the full contents of the deed. 3. An acknowl-

edgment that she voluntarily sealed and delivered it. In this case, we are not compelled to decide, whether the facts of sealing and delivery are shown, either directly, or by "irresistible inference" from the acknowledgment of the indenture as her deed. It is sufficient for present purposes that the certificate of acknowledgment does not show that the contents of the deed were made known to the wife. This is a fatal omission, which prevents the acknowledgment from barring the complainant's right to recover.

Decree for complainant.

McGregor & Co. *v.* Kilgore.

Stipulation in a bill of lading that the shipper, in case of low water, may reship in other craft, does not vary his obligation to deliver safely. Such stipulation is for his benefit, and continues his liability if resorted to.

Where the shipper is held liable for injury of the goods shipped, the rule of damages is the value of the goods at the place of delivery.

This cause was adjourned in Hamilton county. It came before the court upon a special verdict. The action was case upon a bill of lading, dated July 5, 1832, for certain parcels of merchandise consigned to the plaintiffs, shipped on board the steamboat Chesapeake, to be delivered at Cincinnati *in good order (the [359 danger of the river alone excepted); "but in case of the water not admitting the boat to proceed to Louisville, the owners of the goods to pay the expense of reshipping to that place from the point where they are reshipped, and the captain agrees they shall be forwarded without any delay." Breach, that through the carelessness and negligence of the defendant, the goods were lost.

Plea, not guilty; notice that the low water would not permit the boat to go up to Louisville, and, therefore, the goods were landed at Trinity, near the mouth of the Ohio, and were injured after they were so landed. The jury returned a special verdict, finding:

1. The execution of the bill of lading, the shipment of a cask of cutlery to be delivered in Cincinnati according to the bill of lading, and the delivery of the cask in an injured state at Cincinnati.

2. That the amount of the injury upon the sterling cost and insurance is.....$419 24
The amount exclusive of insurance..... 389 24
The amount, adding sixty per cent. to the sterling cost...622 78
The amount, predicated on the value at Cincinnati, and the proceeds of sale.....789 58

3. That the said cask of cutlery was landed at Trinity, at the mouth of the Ohio, and left in charge of the defendant—the boat having returned to New Orleans—was placed under a temporary shed erected for the purpose, near the river, and several days afterward, while the boat hands were attempting to remove it to another place of deposit adjoining, the cask being large and heavy, slipped away from the workmen and rolled into the Ohio river, and damaged the goods by the wetting.

And if upon these facts the court is of opinion the law arising is with the plaintiffs, they find the defendant guilty, and assess the plaintiff's damages to the amount of either of the sums returned, which in law is the true rule of damages, with interest to be counted and added as in law, is right. But if the court shall be of opinion that, upon the facts there is no legal right in the plaintiff to recover, then the jury find the defendant not guilty. It was a conceded matter at the trial that the goods were landed because the water in the Ohio river was too low for the Chesapeake to ascend to Louisville.

360] *After the goods were landed at Trinity, the defendant wrote to the plaintiffs notifying them of the fact, and asking advice as to the shipment up. The following answer was sent to the letter:

"CINCINNATI, *August* 14, 1832.

"CAPT. KILGORE—*Dear Sir:* Your favor of the —— instant, came duly to hand. You wish to know if you shall forward our freight to Louisville at fifty cents per one hundred pounds.

"We do not wish it sent at such a high freight. There is now a rise of water which will enable any of the common boats to get to Louisville with considerable freight on board. Our loading is of such a heavy nature as will not allow the present high rates of freight. You will please to send it up as soon as you think the freight is at as low a rate as it will be at before the fall rise—say, twenty or twenty-five cents per one hundred pounds to Louisville.

We are not very much in want of it. We hope there is no additional expense accrued at Trinity on the goods.

"We understand there was some of our freight sent to Louisville some time ago—say, when the Chesapeake arrived last. We have not yet received it, nor have we heard from it. We hope, however, that the present rise of water will enable you to forward all the freight at fair prices. You will please engage it all the way to Cincinnati if you can.

"Respectfully, your most obedient servants,

"J. McGregor & Co."

E. S. Haines, for the defendant, insisted:

1. That inasmuch as by the bill of lading the defendant was allowed the privilege of reshipping, in the event of low water, and by the custom of the river he had a right to land and keep goods on land until opportunity for reshipment occurred, the landing at Trinity terminated the liability of the defendant as a common carrier.

2. That on the landing of the goods at Trinity, the captain of the boat became the agent of the owner, and liable only as a warehouseman, because the preservation of the goods thenceforward was for the convenience of the owner only. 4 Durnf. & E. 581; 12 Johns. 232, 233; 8 Taunt. 443; Story on Bail. 272, 343; 3 and 6 Cowen, 266; 7 Cowen, 497; 8 Cowen, 233; 8 Serg. & Raw. 552, 553.

*3. In case the defendant is liable as a carrier, he is only [361 so liable to the amount of the invoice price, or the price at the port where the goods were shipped, without regard to the price at the place of delivery. 3 Caine, 219.

B. Storer, contra, cited Story on Bail. 359, 329; Abbott on Ship. 259; 1 Wils. 282; 1 Doug. 278; 8 Johns. 164; 3 Caine, 219; 14 Johns. 132; 1 Wash. 6; 6 R. 17; Abbott, 3 pt. chap. 3, sec. 10; 2 Molloy, ch. 2, sec. 14; 3 Kent, 175; 10 Johns.; 14 Johns. 171; 15 Johns. 38; 12 S. & R. 183; 1 Pet. 177.

Judge Wright delivered the opinion of the court:

It was not contended on the trial before the jury, nor is it now insisted, but the water in the Ohio river was so low when the Chesapeake arrived at its mouth, as not to admit of her proceed-

ing to Louisville. There was no dispute then, nor is there any now, that the letter in evidence was written by the plaintiffs to the defendant, and received by him at Trinity after the goods were landed there. I therefore take these two facts as a part of this case, though not included in the finding of the jury.

The bill of lading was a contract to carry from New Orleans to Cincinnati, and deliver to the plaintiffs there in good order, with privilege to the carrier in case of low water to reship for Louisville in some other craft, and charge the increased expense of such reshipment to the consignee. The first point presented, it appears to us, is, did the landing of these goods at Trinity in order for their reshipment, put an end to the defendant's connection with them as carrier under the contract, and convert him into a warehouse keeper and forwarder? There seems no necessity for inquiring into the custom of the river when goods are transhipped, to land and protect them by temporary warehouses, if none other can be had, until a suitable craft arrive to take the lading up the river. The bill of lading gave the carrier the privilege of forwarding the goods on other craft than that in which they were shipped in one event, and it seems to us the right to land may be conceded as incident to the shipment without at all affecting the questions before the court. It was but a *privilege* to the carrier, in the execution of his contract to convey and deliver, inserted for his own benefit, to secure him the advantage of as great a por-
362] tion of the freight as he could earn, and to throw *upon the owner any increase of expense. The relation of carrier continues from the shipment of the goods until their arrival at their destined port and delivery, unless that relation has been interrupted by some act of the owner or consignee. In that possible view of the case the letter alluded to was read in evidence. It is now claimed that that letter constituted the defendant the agent of the plaintiffs, and put an end to his duties as carrier. There is nothing in the case, and there was no evidence on the trial, to show that this letter was received by the defendant before the accident to the goods. If, therefore, the receipt of the letter was admitted to affect what the defendant urges, a state of things is not shown in this case in which the letter can bear upon the injury. The utmost that could be claimed for this letter, if received before the injury, would be to exonerate the carrier from injury while the goods were detained, under the letter, for lower rates of

freight. It can not reach back to influence an injnry which the goods received immediately after they were landed, and before the letter was received, or perhaps written. The defendant had these goods, as carrier, when they were injured, and is subject to the law of carriers. "A common carrier warrants the safe delivery of goods in all but the excepted cases of the act of God and public enemies." 10 Johns. 7. A carrier, in taking freight, is bound to use sound and proper hands and machinery for lading and unlading, and the safe handling and removing the goods; and if loss ensue from the failure in any particular the carrier must bear it. Abbott, 259; 1 Wil. 282; 1 Doug. 278. The injury in this chase resulted from the want of machinery to remove heavy articles, or the carelessness, inattention, or want of strength in the hands employed.

It remains, then, only to inquire into the proper rule of damages in the case. The goods were delivered at Cincinnati in an injured condition. The carrier earned full freight for their transportation. It would seem to be the dictate of natural justice that the person liable for their safe delivery should make good to the owner the injury they sustained while under his care and control. The owner was entitled to the goods at Cincinnati in their perfect state. But for the act of the defendant he would have had them in that condition. The carrier, in case he deliver the goods at the port of delivery, earns, and is entitled to demand full freights, notwithstanding they have been partially injured, and the consignee must look to his *bill of lading for indemnity. In [363 New York the rule is established that the measure of damage is the value of the goods at the port of delivery. 15 Johns. 38; 14 Johns. 171. The Supreme Court of Pennsylvania, upon full examination, held it best to remove from the carrier all temptations to fraud, and that was best done by making him liable for the value of goods lost at the place of delivery, and established that as the rule of damages in such cases, founded upon authority, general convenience, and good policy. 12 S. & R. 186. These authorities are not shaken by those cited by the defendant. We think this is obviously the rule of law and justice. The jury have returned two valuations looking to this point.

1. The value, adding sixty per cent. to the sterling cost, as the usual mercantile estimate in Cincinnati, to cover the charges, freight, and insurance from Liverpool.

2. The actual value of the goods in Cincinnati, deducting therefrom the proceeds of the goods, sold in their injured condition.

Which of these furnishes the rule of damages is the question? The first is the usual mode of ascertaining the net cost of such goods in Cincinnati. In the absence of other evidence, that would be taken as the value of the goods. But when the actual value is found, the supposed or presumed value yields. That is the case here, the jury have assessed the damages, as predicated on the actual, as well as the supposed value, the actual value measures the real injury, and is the rule of damage.

Judgment for the plaintiff for that sum, with interest.

KEYSER AND ANOTHER, FOR THEMSELVES AND OTHERS, *v.* STANSIFER AND OTHERS.

Where a religious society purchase land, and the title vests in them in fee, as a corporation, the majority of the society have a right to control its use and occupation, of which they can not be deprived by any supposed error of doctrine.

THIS was a bill in chancery brought here by adjournment from the county of Montgomery. The object of the bill was to obtain possession of certain property purchased, improved, and occupied as a place of worship, by a congregation of the Baptist denomination. The pleadings and proofs make the following state of facts:

364] *On May 29, 1824, the First Baptist Church, of Dayton, was founded, a declaration of faith and rules of business in meetings of the church were agreed on and adopted. The form of faith established under this organization was that professed by those who call themselves Particular Baptists.

On July 27, 1827, at a regular meeting of this society, these articles were unanimously abrogated, Keyser, one of the complainants, being present, and new rules of faith and doctrine adopted.

In September, 1827, Keyser, Gosney, and Stansifer were elected trustees. On November 7, 1827, they purchased a lot in the town

of Dayton, and took a conveyance to themselves as trustees of the First Baptist Church, in Dayton, and to their successors in office. By the operation of the statute of 1825, vol. xxix, page 464, these trustees became a corporation, and the title in fee became invested in them by the conveyance. A house of public worship was erected upon it, partly from the contributions of the society, and partly by the aid of donations from others.

On March 23, 1829, certain charges were preferred against Keyser, in a course of discipline, and he was excluded from the society by vote, and another trustee appointed in his place. On the 31st of the same month, all former creeds and symbols were abolished by the society, and a new covenant introduced, by which the New Testament was declared the only rule of faith and practice.

The bill brought by Keyser, the excluded trustee, and by Cox, charges that the defendants by abandoning their original declaration of faith, and certain usages common to the Baptists, by embracing certain doctrinal errors, and by thus separating themselves from the general Baptist association, have ceased to be the First Baptist Church, of Dayton. That the First Baptist Church consists of themselves and their associates, who from their numbers, in part consisting of married women, and of such as have connected themselves with the schism, can not all unite in their bill. They ask to be permitted to prosecute the bill for the benefit of themselves and all concerned, and pray the court to decree an appropriation of the property in question to its legitimate use.

F. Dunlavy, for complainants, cited 29 Ohio L. 81; sec. 1 and 2 Ohio Stat. passed January 3, 1825; reprinted vol. xxix, p. 464; *also 5 Ohio, old ed. 286; Methodist Church *v.* Wood, 4 [365 Ohio, 415, 542; Price and Others *v.* Methodist E. Church; Shotwell *v.* Henderson and Others (New Jersey case in chancery), Judge Ewing's appendix, 40, 41; Id. 51. 52; Id. 76, 77; Id. 84, 85.

Crane and Schenck, for respondents, cited 3 Mer. 418; 1 Term of Communion, 17.

Judge Lane delivered the opinion of the court

Upon what principles are the complainants entitled to relief?

If this were a donation made to accomplish a particular object expressed in the deed, the terms of the limitation would secure the use, and equity would take care it was not diverted from the end for which it was designed. But this land was purchased, it belonged to the society in fee, and it was held by them as their absolute property.

If this land became the absolute property of this association, subject to no use except its general purposes, it is incident to the very nature of a corporation to hold such property at the will of the majority, if the charter of incorporation does not otherwise provide. It is theirs to dispose of, to retain, or to occupy after their own pleasure. 5 Ohio, 205. They would not be permitted to exclude their fellow-corporators. But they may occupy and manage as they please, admitting the minority to the same benefits as themselves.

But this claim is not set up because the minority are excluded, but because it is asserted the majority have deserted the principles under which the association was organized, by which they have ceased to be the "First Baptist Church of Dayton." It does not follow that they lose their property by ceasing to entertain certain opinions. The declaration of faith under which they were organized, contains no attempt to bind them to abide in the same belief. It is shown in proof that each Baptist church is in itself a whole, separate, and independent—at liberty to form its own creed, and looking to others for counsel and social intercourse only. The opinions of such a body can not but change. To fix their fleeting wherries; to anchor them immovably in the stream of time is beyond human power; for the mind, at least, is free; ranging by its inherent strength through the boundless fields of knowledge, molding its belief according to its apprehension of the 366] truth, and incapable of *fixedness until the day when all truth shall be made known. And if it were possible, it were wrong; to limit activity of mind is to set boundaries to human knowledge.

No such effect appears to have been contemplated by these parties at the time of their original association. Their articles were not regarded by them as binding forever. They were changed by themselves, at the meeting of 1827, by an unanimous vote, to which one of the complainants was a party—the other not being a member of the church. The land was not purchased until after this

change, and the society became no legal corporation before it; so that the original declaration of faith could raise no use nor prescribe the manner of holding the property. It was organized under the predominance of opinions which the complainant would now repudiate as heretical. They, the minority, at best, can have no right to divert it from the uses to which it is devoted, by the expressed will of the corporation, upon account of any supposed errors of doctrine or of faith.

Bill dismissed.

WALLACE'S LESSEE v. MINER.

Possession of land before patented can not be regarded as adverse to the government, and protected by the statute of limitations.

Presumptions can not be received to contradict admitted facts.

Declarations made before the commencement of title under which the party claims, are not evidence in ejectment.

Recitals are not estoppels, where the deeds containing them are not operative.

THIS case was adjourned from the county of Ross. The plaintiff's title, as offered in evidence on the trial, was as follows:

1. A patent to the heirs of Powell, by name, dated November 4, 1818, for survey, No. 503, for eight hundred and sixty-five acres.

2. Deeds from Powell's heirs to the lessors of the plaintiff, covering the whole land included in the patent, and dated April 15, 1826, the other dated September 17, 1830.

The defendant was admitted to be in the possession of one hundred acres at the lower end of the survey, to recover which the suit is brought.

367] *The defense set up was as follows:

Powell's survey, made in October, 1799, and recorded March 17, 1794, and the plat and certificate taken out of the land office by Gen. Massie, in order to get a patent.

Proof, that Massie was in possession of the whole of Powell's survey, in 1795, claiming title, and in 1808, conveyed to Abrams by deed of warranty with but one witness, in which the patent is recited.

That possession followed this conveyance, and with the title was regularly submitted to Joseph Kerr.

Deeds were executed by Abrams to Finley in 1809 (with but one witness), and from Finley to Kerr, in 1814. Each of these deeds contain covenants of warranty.

In 1816, a judgment was recovered against Kerr, on which execution was sued out and levied upon the one hundred acres in dispute as Kerr's property, and in 1829 it was sold on the execution, and conveyed by the sheriff to Miner, the defendant.

Miner brought ejectment in the Ross common pleas, and Wallace, the lessor of the plaintiff, was admitted to defend. Judgment was recovered by the plaintiff in June, 1831, and Miner put into possession, and has since died.

A deposition made by the lessor of the plaintiff in a suit pending in the circuit court of Kentucky, in which the defendant states: that he was acquainted with Massie's heirs and was acquainted with the title; that Powell sold the survey No. 503 to Orr, and Orr to Massie, for a given sum per acre. That Massie in his lifetime made affidavit and lodged it in the war office, which described the survey as assigned by Orr to Massie. That he, Wallace, believed Massie became owner of the survey by fair purchase from Orr, who bought it from Powell. That Massie, who was fully competent of such matters, gave Orr near four thousand dollars for the survey, and laid out part of the town of Chillicothe upon the land; which he would not have done if he had no evidence of Orr's title. That in 1817, it first became known, that no patent had issued for the survey No. 503, and Watts had commenced suit against Kerr for the recovery of this land. McArthur made a new entry of one thousand acres upon the disputed land, and wrote to Col. Anderson, the surveyor of the Virginia military district, urging him to an immediate survey of the entry, and Kerr, finding this new enemy in the field, took out a duplicate of Powell's survey, and from pure friendship received 368] McArthur's survey from Col. Anderson *to carry it from him; but on his return forgot to deliver it to McArthur, until after he had obtained a patent in the name of Powell's heirs, and then he congratulated himself upon having driven Gen. McArthur from the field.

On this evidence a verdict was taken for the plaintiff, subject

to the opinion of the court, upon the law arising upon the state of case disclosed.

T. Scott, for the plaintiff, insisted:

That the deeds from Massie and Orr being defective, as conveyances, passed no estate to Orr and Kerr, which could be available after the patent issued. 5 Ohio, 190; 1 Marsh. 497, 501. That the legal title does not vest until a patent issues, and could only be passed from one to another by deed. 1 Ohio, 244, 313; 3 Bibb, 70. Equitable interests in land are not held by the lien of judgments or liable to sale on execution. 1 Ohio, 314–320. Mere intruders are not allowed to question the validity of a patent under which the plaintiff claims. 3 Ohio, 236. Covenants merely pass no legal estate, though certain covenants contained in operative deeds of conveyance, where they pass any interest, estop the grantor from setting up an after-acquired title, and so in effect make it inure to the grantee; but it is essential to this effect that the deed pass some estate. Co. Lit. 45; 3 Bibb, 249, 250. The holder of a new equitable interest, though in possession, can not defend himself against the legal estate. 1 Ohio, 349; 2 Ohio, 264. The statute of limitations does not run against the government. 1 Marsh. 506; 4 Bibb, 63, 4, 554; 6 Pet. 672.

R. Douglas, for the defendant:

The right of the plaintiff to the possession of the premises is the true question in this action. It is a legal right, and different from a naked equity. 7 Term, 329; 1 Bibb, 129; 5 Cowen, 200; 2 Caines, 335; 6 Pet. 431; 3 Ohio, 59.

Kerr's title was a good legal title, and regularly came to the defendant.

A patent to Powell, and a grant from him to Massie, must be presumed from the lapse of time the property has been adversely held. Both parties claim under Powell, the defendant, through his presumed grantee Massie, and the plaintiff, by conveyance from his heirs at law, the patentees. 1 Pet. 628, 638; *1 [369 Ohio, 395, 398, 406, 412; Hardin, 19; Cowp. 102, 215; 3 Stark. Ev. 1201, 1202, 315, 318, 320, 326, 328; 1 Bos. & Pul. 400; 2 Saund. 175, *a*; 7 Wheat. 109, 110; 2 H. Black. 263; 3 Term, 156, 159; 1 Ohio, 349; 2 Ken. & M. 370; 6 East, 215; 9 Johns. 102; 10 Johns. 377; 6 Wheat. 504.

The defendant is protected by the statute of limitations, his adverse possession has continued unbroken for thirty-seven years. This point is too clear for argument. 2 Salk. 421; 1 Ld. Raym. 741; 13 Johns. 40, 513; 1 Ohio, 342–349; 3 Ohio, 59, 254; 1 Burr. 119; 10 Johns. 377; 15 Johns. 159; 1 Wheat. 292, 296. Under a defective conveyance the possession commences at the date of the deed. 18 Johns. 355; 13 Johns. 113; Tit. Adams, 472–482; 5 Johns. Ch. 184; 2 Hen. & Mumf. 318; 1 Bay, 37; 10 Serg. & R. 303; 8 Cow. 589; 9 Cow. 580; 1 Pet. 628.

Wallace obtained the deed from the heirs by fraud, which makes it void and inoperative as a conveyance. He was trustee of Massie's heirs, and his purchase for himself inured to their benefit, if not absolutely void. In the ejectment against Kerr, Wallace claimed to be his landlord, and from his privity and connection with the title was admitted to defend. 1 Burr 395, 396, 474; 1 Stran. 664; 3 Ca. Rep. 77; Ambl. 436; 4 Term, 39; 1 Johns. Cas. 436; Peake N. P. 190, 191; Hardin, 36; 2 Bibb, 583; 2 Bibb, 220; 10 Johns. 457–462; 4 Mass. 488; 3 Johns. 216; 14 Johns, 493; 6 Pet. 328; 2 Ves. jr. 156; 3 Cow. 537; 6 Hen. & McH. 252, 255; 4 Ohio, 232; 1 Blk. 129.

Wallace's depositions contain his declarations and acts respecting the title to this land, and are good against him. 17 Johns. 335, 339; 4 Johns. 140, 230; 4 Pet. 83, 88; 3 Ohio, 110, 111; 5 Ohio, 178, 197.

Judge WRIGHT delivered the opinion of the court:

The legal title to the land in dispute was granted by the government in 1818, by the patent to Powell's heirs. The deeds from them transfer it to the lessor of the plaintiff. Since the emanation of the patent, time has not elapsed to protect the defendant in his posession. Before 1818, the legal estate was in the government, and no adverse possession could protect persons so holding as to bar the government of its claims. Statutes of limitation, without express provisions, never run against the government.

370] *It is claimed that from the lapse of time and other circumstances, a grant from the government must be presumed. It is a fact in the case that no patent did ever issue before 1818, and presumptions never obtain against positive facts, though they often supply the want of facts. The patent issued in 1818, and the dep-

osition of Wallace, introduced by the defendant, both prove that no patent had before issued. The presumption, therefore, fails.

Wallace's declarations made before the patent to Powell's heirs, and his conduct since, while acting as a trustee of Massie's heirs, it is insisted, are conclusive against the right now set up by him, and acquired under the patent from the heirs of Powell. Neither his declarations nor his conduct, whether it be moral and honest or the reverse, affect his legal title in this court, nor does the fact of his standing in the relation of a trustee to Massie's heirs. Dishonest conduct, and that relation may possibly affect him in another tribunal, a court of chancery.

No title passed from Powell to Massie, owing to the defective deeds having but one witness. The recital in Massie's deeds, and that from Orr claiming under him, therefore, work no estoppel against Wallace, who asserts Powell's right. He was in law, neither party nor privy to the covenants in those deeds. 5 Ohio, 190. If the covenants had been inoperative deeds of conveyance, the case would have been otherwise, they would have then run with the land, and been an estoppel to the grantors in them and those deriving title under them.

It seems to us, the law arising upon the verdict is with the plaintiff, and we must so apply it, though we dislike the appearance of the transaction, his trustee relation to the subject, and subsequent purchase.

At a subsequent period of the term the entry was opened, and a new argument directed at the next term, upon the following points:

1. Whether the statute of limitations will run to protect the possession of land in the Virginia military district, after entry and survey, before patent issued.

2. Whether the patent to Powell's heirs in 1818, inured to vest the title in Massie and those claiming under him through the defective deeds.

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*Robert Richey v. Thomas S. Hinde. [37]

The action for use and occupation only lies where a tenancy is established.

Entry on land tortious, the tort can not be waived and rent claimed in an action of assumpsit.

THIS is a motion to set aside a verdict rendered at the trial of a suit in Champaign county, which is reserved for decision here.

The declaration contains two counts in assumpsit: 1. For use and occupation. 2. For money had and received. A verdict was rendered for the plaintiff for one thousand two hundred and forty-six dollars, subject to the opinion of the court; whether, upon the facts proved, a recovery can be had in this form of action. On July 19, 1824, Hinde and wife obtained a decree in the Circuit Court of the United States in this district against Richey, by which Richey was directed to convey to Mrs. Hinde the title to a certain tract of land, and to surrender the possession. In September, 1824, the possession not having been given up, was transferred to Hinde, by an *hab. fac. poss.* issued under this decree. In October, 1824, the deed was executed transferring the title to Mrs. Hinde. In 1828, an appeal having been taken, the decree was reversed. In November, 1828, the possession of Hinde was terminated by proceedings in forcible entry and detainer at the instance of Fox, who had acquired Richey's interest in the land. The plaintiff seeks in this suit to recover the rents and profits of the land while in the possession of Hinde.

SWAN and MASON for plaintiff:

The defendant insists he is not liable in this action.

1. Because the relation of landlord and tenant is not shown to have existed between the parties. We cite, to show this is necessary to maintain the action, Wood. Ten. 432; 6 Johns. 46; 13 Johns. 489; 4 Ohio, 213.

2. We urge the decree of the circuit court was not vacated by the appeal, for the practice of their courts is regulated by that of the chancery courts in England. 2 L. U. 56; 1 Pet. 6; 9 Ves. 316; 15 Ves. 181.

3. Supposing the decree was out of the way, the plaintiff, to recover, should have moved the court for restitution, and had a writ regularly executed. 7 Cranch, 602; 1 Cox, 101; 4 Johns. 609; 3 P. Wills. 379; Croke Eliz. 465; 19 Vin. Ab. 153, pl. 5, Tit. Rent.; 9 Vin. Ab. 590.

372] *4. The decree for possession is like a judgment for the

plaintiff in ejectment, and the same process may be had to recover the possession. Adams' Tit. 225; 3 Ves. 206; 4 Johns. 636.

5. The decision of the cases, 3 Ohio, 264, and 4 Ohio, 205, was right upon authority and reason. Bul. N. P. 138; Wood. Ten. 430; 6 Johns. 48.

6. The legal estate, by the death of Mrs. Hinde and by operation of law, vested in her heirs, who were strangers to the decree, and are strangers to the action. No restitution could after her death be awarded, nor could the legal estate descended be divested without making them parties. 4 Bibb. 195; 2 Salk. 587; 9 Vin. Ab. 590.

7. We conclude the plaintiff has no legal right to sustain this action: 1. Because the relation of landlord and tenant is not shown to exist between the parties. 2. A stranger can not recover rent of the owner without express agreement. 3. Because the legal estate is in Mrs. Hinde's heirs, who are entitled to the rent.

JAMES, for defendant:

If the defendant had any defense to the merits of this case, he would show it in the present form of action, which is so well calculated to do entire justice between the parties. The objection, that the action should be trespass, not case on assumpsit, implies that the plaintiff has a right in some form to recover the value of the rents he has lost, by means of the erroneous decree under which the defendant received them.

There can be no doubt of the plaintiff's right to recover the value of the mesne profits which the defendant had received. It is clear that wherever a writ of *habere facias possessionem* has been executed by giving possession, and is avoided by the judgment of a court, a writ of restitution should be awarded. Lowery *v.* Jenkins, 3 Bibb. 314.

If a judgment be reversed, the party shall be restored to all he has lost by occasion of the judgment, and a writ of restitution be awarded. 2 Tidd. 1136; Cummings and Wife *v.* Noyes, 10 Mass. 433; Tappen *v.* Van Wagenen, 3 Johns. 465; 1 Har. & Johns. 408, 409.

At common law, the mode of restitution was for the sheriff, when the restitution was for land, to ascertain by a jury the value of the rents and profits, to levy the same and pay over *to [373

plaintiff. 10 Mass. 433. But in Ohio the value must be assessed in court, and for this purpose assumpsit is proper.

The action of assumpsit will lie wherever a person, without any valuable consideration on his part, has received money which in good conscience belongs to another, and which *ex æquo et bono* he ought to refund. 2 Comyn on Contracts, 5.

If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt, and gives this action founded in the equity of the plaintiff's case, as if it were upon a contract. 2 Burr. 1008.

It lies in numberless instances for money the defendant has received from a third person, which he claims title to, in opposition to the plaintiff's right, and which he had by law authority to receive from such third person. Ib. And it is not necessary there should be any privity between the parties, except that which is created by law. Ib.

So it lies against an overseer of the poor to recover money in his hands which had been levied on a conviction, which was afterward quashed. Felthean *v.* Terry, Lofft, 207, cited in Cowper, 419.

Indebitatus assumpsit will lie for rent, received by one who pretends to a title; for in such case an account will lie. Arris *v.* Stukely, 2 Mod. 262.

If a man, pretending title to my land, receive my rent, and get my tenants to attorn to him, an *indebitatus* has been held to lie for the money. 12 Mod. 324.

And on the same principle, if one tenant in common receive all the rents, his co-tenant may bring assumpsit for his part. 9 Mass. 538.

It will lie wherever account will lie. 2 Mod. 262, and 12 Mod 517. "A man shall have a writ of account against one as bailiff or receiver, where he was not bailiff or receiver; as if a man enter into my land to my use, and receive the profits thereof, I shall have account against him as bailiff." F. N. B. 117, A.

"Account lies against him who receives my rent without my appointment." Ibid. "If one receives rents from my tenants without my assent, account lies, and *n'unque* receiver, shall not aid him." Ib. 118, B.

The action for money had and received can not be too much encouraged, if the defendant be guarded from surprise. 1 Johns.

135. It is in the nature of a bill in equity, and therefore *to [374 support it the plaintiff must show that he has equity and conscience on his side, and could recover in a court of equity. 2 Johns. 370. The question always is, "is it against conscience that the defendant should keep the profits he has received." Cowper, 793.

A bill in equity will lie for rents where the party receiving them has made entry. 2 Vern. 724; Curtis *v.* Curtis, 2 Bro. C., party receiving them has made entry. 2 Vern. 724.

Both from principle and precedent, this action would be proper in this case from the circumstances of it; as it is the mere instrument of ascertaining the value of a right, resulting from the decree of a court, it may be used if no rule of law forbids it; the action of trespass might for this end merely answer the purpose as well. But in that there would be this inconsistency, that the defendant would be charged with entering *vi et armis*, when in fact he was authorized to do so by judicial process. If it be said that the first judgment is void by the reversal, and can not be shown in his justification by the defendant, it may be answered, that this is merely a fiction of law. If it be said that the party uses the judgment and process, he does it at the peril of being a trespasser from the beginning. On the avoidance of the process it may be asserted with as much consistency with truth, that entering under a known, legal liability, to account for the issue and profits if the judgment should be reversed, he undertakes in that event to account accordingly. 10 Mass. 435.

The action of assumpsit is more favorable to the defendant than the action of trespass. In the former he accounts for only the nett value of the profits received, after deducting rents and interest on them which has been done in this case; and he would not be chargeable for the time the property stood idle without his default. But in the action of trespass the plaintiff might recover damages beyond the amount and value of the rents actually received. Cowper, 416.

The action of trespass for mesne profits would not lie in this case; for that action can only be brought after a recovery in ejectment. Adams on Ejectment, 328; 1 Atk. 525. In this case there has been no recovery—no establishing of trespass. The declaration in trespass for mesne profits requires a recital of the recovery in ejectment, the value of the rents, etc.

This whole action of trespass for mesne profits is a contrivance of a very awkward construction. It is founded on a recovery 375] *in ejectment, and the record is evidence of the trespass. But the recovery of damages in ejectment is no bar for mesne profits for the same trespass. The recovery in ejectment is then mere evidence of a right established, and yet courts have held, in actions of assumpsit for use and occupation, that it was treating the party as a trespasser for the same thing. It has caused many of the distinctive characters of an action of trespass to be abandoned for the furtherance of justice. Thus it has been decided in New York, that the action for mesne profits is an equitable action, and will allow of every kind of equitable defense: 2 Johns. Ca. 438, and in Maryland it is said that a recovery in trespass for mesne profits, is only for use and occupation of land, and does not bar an action of trespass *quare clausum fregit* for injuries done to the premises in the same period: Gill *v.* Cole, Har. & Johns. 403; so that it becomes at last in its nature very much like an action of assumpsit.

The plaintiff is not furnished with the argument of defendant's counsel, on the motion to overrule the evidence and enter a nonsuit. It is understood, however, that he relies chiefly on the case of Butler *v.* Cowles, 4 Ohio, 213. The court there decided that the action of assumpsit for use and occupation will not lie to recover mesne profits after a recovery in ejectment. That case was regarded as settled by Birch *v.* Wright, 1 Term, 378, where the reason is given, that the plaintiff has already elected to treat the defendant as a trespasser, and thus destroy the presumption of a contract. But in the present case the defendant has not been treated as a trespasser. Nor has there been any recovery in ejectment.

The plaintiff regards this as an open question, untouched by the decision in the above case, and if it is thought that propriety of the count for use and occupation is questionable, indulgence is asked for an effort to show that some of the *dicta* appended in that decision, were not duly considered by the writer of the opinion.

It has been often, but erroneously, said, that at common law assumpsit for rent lay only on express promise given at the time of the lease; and that the action of assumpsit for use and occupation was given by 11 Geo., 2 chap. 719, which was enacted in 1738. But it had been in use long before. The case of Dartnal *v.* Morgan, Cro. Jac. 598, was decided in 1621. The case of Sleck *v.* Bow-376] man, Cro. Jac. 668, was decided in 1623. The *case of How

v. Norton, 1 Leving, 179, was decided about 1680, and in all of them the promise was implied in consideration of the occupancy. The quotations already made from 2 Mod. 262 (anno 1689), and 12 Mod. 324 (anno 1700), show that the courts then held it settled that an *indebitatus* would lie.

The case of How *v.* Norton was assumpsit in consideration that the plaintiff would permit the defendant to enjoy such land, and that he permitted him to enjoy it three years, and that it was worth ten pounds per annum. After verdict for plaintiff it was moved in arrest of judgment: 1. That it does not appear that the plaintiff had any title to the land. 2. If he had title, debt lies and not this action; but the court held the contrary on both points and gave judgment for the plaintiff.

So far, then, as the statute authorized the action, it only affirmed the common law; but the object of the law was to enable "landlords to receive a reasonable satisfaction for the use and occupation of lands held by defendants where the agreement was not by deed." Before the statute, landlords were continually nonsuited by the tenants proving at the trial some parol demise, or memorandum in writing amounting to a demise; for, in in that case, the landlord ought to have brought an action of debt, and not case on assumpsit, which was remedied by the statute; "and if, in evidence on the trial of such action, any parol demise or any agreement, not being by deed, whereon a certain rent was reserved, shall appear, the plaintiff shall not, therefore, be nonsuited; but may make use thereof as an evidence of the quantum of the damages to be recovered."

But the statute, nevertheless, has controlled the decisions in England; and the same act having been in force in New York and in Massachusetts, their courts have conformed closely to the letter of the decisions requiring the relation of landlord and tenant to exist.

If it were correct that the action was first given by the statute of 11 Geo. II., is it thence to be argued that the action will not lie at all in Ohio, inasmuch as the English statutes have no obligation here? It may be confidently answered that the great remedial powers of the common law will accommodate to every emergency of justice, and mete protection and security to every private right. It is in force here according as it may suit our circumstances and condition; and the courts are invested with an original discretion to mold its form and direct its action to the

377] furtherance of justice. This benign principle will *fully establish, that the action of assumpsit for use and occupation will lie in cases by the owner of land against any one who has enjoyed the same, except where the owner has elected to treat the occupant as a trespasser. Wherever a person establishes his right to land as owner, and proves the occupancy of it by another, the law will thereupon imply an undertaking, and promise, by the occupant, to make a reasonable compensation for the occupancy. This is the great perfection of the rule finally established in this action, which has always been struggling for enlargement; that whoever has enjoyed the benefit of another's goods, or labor, or property, he must pay to the rightful owner a just consideration for it, unless he show an agreement to the contrary. The law does not seek for promises, in fact, but implies them, if good conscience requires them. And this is done in a variety of cases, where the conduct of the defendant does not warrant the presumption of an agreement in fact. Thus where one unlawfully converts to his own use the goods of another, the owner may waive the *tort* and bring assumpsit for the value of them, and the action has been held to lie against one who steals another's money.

The same rule was formerly recognized in England as to the mesne profits where a recovery had been had in ejectment. In Cheney *v.* Butler, Cowp. 246, Lord Mansfield said (1775) that ejectment and assumpsit for use and occupation had both been brought for the same premises at the same time, and recovery had in each case. On objection made, it was holden that one of the remedies was not a waiver of the other. Why? Because they were both brought for several demands, to both of which, the plaintiff was entitled; consequently, one could be no waiver of the other. In 1781, it was recognized in Goodtitle *v.* North, Doug. 584, as having been argued and decided in King's Bench, that a party may, after a judgment in ejectment, waive the trespass and bring use and occupation for the mesne profits. For the first time it was ruled differently in the case of Birch *v.* Wright, 1 Ter. 378. It was there held, that for all rent due anterior to the time of the demise, that assumpsit would lie. Because, by the statute of 4 Anne having rendered attornment unnecessary, and having put the party in the same situation by the conveyance as if the tenant had attorned, he is to be considered in possession; and then as there was no deed, use and occupation would lie. The same has been held

as the settled law of Ohio. 3 Ohio, 265. But it must be for another
378] *cause, to wit: that the owner is entitled to compensation for the use of his land by another. But for the rents posterior to the date of the demise, it was held, that the action would not lie. For this the court gave a kind of fever and ague reason, that the plaintiff could not be permitted to blow both hot and cold at the same time. (The decision was made in *November*.) The reasons of the decision are not satisfactory; they allege that the plaintiff had not waived the tort, but insisted on it by bringing his action of ejectment; that in one action he insists that the defendant is his tenant, and shall therefore pay him rent; in the other, he says, he is no longer his tenant, and must deliver up the possession. This is not a true statement of the effect of the two actions; and this discrepancy would exist only in case the plaintiff by one action was seeking to prolong and continue the tenancy, and in the other to abridge it. But they have no connection nor do they clash. The ejectment may be used either to dispossess a tenant, not desired to be retained, or to establish a title which he disputed. It does not seek damages for the rent, nor need it be noticed in the action of assumpsit for the rent, or mesne profits. The two actions could not be brought for the same thing; but they are brought for different things. The recovery in ejectment at best is nothing more than evidence; and it is hard to perceive how the fictitious trespasses of Richard Roe can, by rule of court, be so completely transferred to a defendant admitted to defend a title only, that the plaintiff should thereby forfeit a remedy which he unquestionably had previously, and which could be sustained by the same evidence that would support the claim before the demise.

The defendant at the trial proved the death of Belinda Hinde, in November, 1827, which was prior to the reversal of the decree, and that the case had not been revived against her heirs. The decree can not be impeached collaterally; and however erroneous it might be, it must be held binding until reversed.

Judge LANE delivered the opinion of the court:

The verdict must be sustained by holding the affirmative of one of the following propositions: that the profits of land held under these circumstances, may be recovered in an action for use and oc-
379] cupation; or that the money received by the defendant *as

rent, *ex æquo et bono* belongs to the plaintiff, and may be deemed money had and received to his use.

The law prescribing forms of action is in a great measure arbitrary, yet where the distinction between them is plainly and definitely marked by a course of decisions, we are not at liberty to transcend the boundaries. In Massachusetts a suit like the present might be supported; 10 Mass. 433; 17 Mass. 299; but in England, and New York, and in this state, it is settled by authorities too strong to be disregarded, that an action for use and occupation will be in those cases only where a tenancy subsists. 11 Taunt. 105; 6 Johns. 46; 13 Johns. 489; 4 Ohio, 205. The defendant entered on the land as his own, claiming title; consequently the suit is not sustainable in this aspect.

Where one man has money which equitably belongs to another, it may generally be recovered in an action of assumpsit for money had and received to the use of the plaintiff. And even where the money is received after and in consequence of an act of trespass, in many cases the tort may be waived and the money itself sought by suit as received to the plaintiff's use. Hambly *v.* Trott, Cowp. 378; Sir Th. Jones, 127; Cases Collated, Saund. Pl. and Ev. I. 127.

But it is believed to be unprecedented to waive the tort where a trespass is committed upon lands under a claim of title. The case of Arris et al. *v.* Stukeley, 2 Mod. 262, does not sustain such a position; it shows only that where one receives my rent in my name, under a pretended authority from me, I may sustain assumpsit, because I may charge him in account as my receiver, and he may not deny his pretended authority. The action of assumpsit is an inconvenient form of litigating titles to lands, and it may lead to an injurious interference with the laws concerning occupying claimants. And it is unnecessary to extend this form of action to this case, since the law has otherwise furnished ample remedy. A judgment of restitution is incident to every judgment of reversal, and there is a plain mode for carrying it into effect. 10 Mass. 434; 13 Coke, 21; Rast Ent. 308; 12 Serg. & Rawl. 292; 4 Ohio, 375. The rights, therefore, of the plaintiff, subsist, or should subsist of record, and in our opinion they can not be asserted in the action of assumpsit.

It is unnecessary to decide the other point made as to the effect of the deed to Mrs. Hinde. The defendant is entitled to a new trial.

*THOMAS SAUNDERS v. ABRAHAM STOTTS. [380

Plea to an action on a sealed note, that it was obtained by fraud, covin, and misrepresentation. Good on demurrer.

Fraud may be specially pleaded in bar, even where it might be given in evidence on the general issue.

THIS was an action of debt, adjourned for decision here from the county of Franklin. The case is stated in the opinion of the court.

STARLING and GILBERT, for plaintiffs.

G. SWAN, for defendants.

WOOD, judge, stated the case and delivered the opinion of the court:

The plaintiff in his declaration counts on a sealed note, bearing date July 20, 1827, for the sum of five hundred dollars, payable on or before the 15th of November next after its date. To this declaration the defendant has filed a special plea in bar that the said note was "obtained from the said Stotts by the said Saunders, and others in collusion with him, by fraud, covin, and misrepresentation." 2. Plea, *non est factum*. To the special plea there is a general demurrer and joinder.

The only inquiry is, can the special plea be sustained? That fraud is a defense at law is not now to be considered as an open question. It has been settled by numerous adjudications. So far has the principle been carried, that in a court of equity a defendant will not be relieved against a penal bond, obtained from him by fraud, if he has neglected to make his defense at law. 2 Ohio, 7.

But to avoid a deed, it is claimed the only fraud which can be pleaded at law is fraud in its execution, such as its fraudulent reading, the substitution of one instrument for another, or the obtaining by some devise or fraudulent representation such an instrument as the party did not intend to give. This is doubtless the law on the subject. 2 Johns. 177; 13 Johns. 430; Hall, 446. Let us apply this law to the case before us. The defendant has

plead that the note was obtained by "fraud, covin, and misrepresentation." The counsel for the plaintiff claim that this plea is bad because it does not set out the facts and circumstances on which the fraud arises, and that it is uncertain from the plea whether the fraud, covin, and misrepresentation it sets up have 381] reference to the inducements *to the execution of the note, or the execution itself. This may be answered thus: that fraud is a mixed question of law and fact; that it consists of a multiplicity of circumstances, and therefore might be inconvenient to require them to be set forth. 2 Mau. & Sel. 377. That there are many precedents, directly in point, which are evidence that the law holds such general allegation of fraud and covin sufficient. In Will. Pr. 93, the pleader is advised to add a plea of fraud and covin generally, omitting a statement of the particular misrepresentations. Several authorities are cited to sustain such position. 13 Johns. 430, it is true, is said by the author to be against the sufficiency of such plea; but with due respect for his accuracy, I am led to a different conclusion. I find nothing in that case against the sufficiency of such plea as he advises the pleader to add. The action was debt on a bond. The defendant craved oyer, and set out the condition, and filed a special plea setting forth divers fraudulent statements and misrepresentations, all of which were inducements to the making of the bond, but none of them had any relation to a bearing upon its actual execution. The plaintiff demurred specially, and the court determined the plea was bad; that the fraud alleged was in the representation of the thing for which the bond was taken, and did not by the plaintiff's own showing relate to the execution of the bond. In this very case it is also worthy of remark that there is a third plea of fraud in obtaining the bond generally, to which there is a replication; and from anything to be gathered from the case, was considered by all concerned as a good plea. I have been more particular in this case because the plaintiff's counsel say it is the authority on which they mainly rely to support their position that the plea here filed is bad. I think it is entitled, at least, to some consideration, as an authority for the defendants.

It is said that this plea affords no notice to the opposite party, whether it is fraud in the execution of the note, or only misrepresentations which were the inducement to make it; which only amount to a want of consideration, and are no defense to a valid

instrument. It would seem to me this objection, on general demurrer, at least, is not well taken. The very nature of a valid instrument precludes an inquiry into the want of consideration; any representations made, therefore, to induce its execution, as to the nature or quality *of property for which it is given, [382 and which do not amount to fraud in the execution itself, are settled by the law not to be the subject of inquiry. The plaintiff could not, therefore, be misled by supposing the inquiry, under the plea, would be a species of fraud, which the law would not permit on this trial to be investigated.

It is clear, then, that no other construction can be given to this plea than that the fraud, covin, and collusion it sets up, or such as relate to the execution of the note, and in this particular the plea is sufficiently certain. Is this plea bad because it does not aver the acts which constitute the fraud? The current of authority is certainly the other way. In 2 Hall, 434, there is a replication to a special plea in bar, setting up that a deed of release was obtained by fraud and covin; this replication was treated as sufficient, although so general and broad in its allegation, for the defendant in his rejoinder took issue upon it. There are many precedents of high authority in the books to support this plea, and we think it sufficient to bar the plaintiff's right of recovery.

One point more remains to be disposed of. The plaintiff's counsel claim that if it is fraud in the execution of the contract, on which the defendant's counsel rely, that such fraud may be given in evidence, under the general issue of *non est factum*, and therefore the plea amounts only to the general issue, and must be held bad. If the counsel are correct on both points of law, their reasoning has nevertheless more ingenuity than solidity, in its application to this case. In assumpsit, payment, award and satisfaction, a release, discharge, and until the case of Imman *v.* Jenkins, a former recovery, might be given in evidence under the general issue. Either of these grounds of defense might be amounting to nothing more than the general issue. Fraud may pleaded, and the plea, I apprehend, would not be rejected as be plead here, but because it may be given in evidence, it by no means converts the plea into the general issue. On all the points made, the plea is held sufficient, and the demurrer is overruled. There is an issue of fact for the jury.

383] *The State of Ohio v. The Heirs of M. Baum and others.

A written proposition to the canal commissioners to convey grounds for hydraulic purposes on the canal, upon certain terms and conditions, not accepted by resolution or otherwise concluded, by specifying the land or reducing the agreement to specific terms, can not be specifically enforced in equity.

This cause was adjourned here for decision in the county of Hamilton. Upon the bill, answers, exhibits, and depositions, the following case is made:

The legislature, in section 10 of the act to provide for the internal improvements of the state by navigable canals, 23 Ohio L. 57, authorized the canal commissioners to apply to the citizens and others for grants or donations, in land or money, for the purposes of aiding the construction of said canals, and to take to the state such conveyances as might be competent to vest in the state a good title in the lands to be granted. By another act, 24 Ohio L. 58, the canal commissioners are authorized to procure land, by purchase or otherwise, at any point on the canal, where the water can be profitably used for hydraulic purposes. Provision is made, in this act, that such contracts shall not bind the state until submitted to the governor and approved by him. Other laws authorize the canal commissioners to sell the surplus water.

The canal commissioners, by resolution of the board, in April, 1826, authorized the acting commissioner to negotiate for the purchase of lands to secure the state the value of the water-power created by the canals, where the amount paid at one point, or upon one contract, should not exceed five hundred dollars; in January, 1828, empowering the acting commissioner to sell or lease the water privileges of the canals for a period not over twenty-five years; in February, 1830, allowing him to sell hydraulic power at prices ranging from twenty-five to two hundred and fifty dollars, for a quantity sufficient to drive a pair of four and a half feet millstones, and the machinery for bolting and cleaning grain, and also to procure land on which to use hydraulic power where there may be surplus water.

M. Baum, in his lifetime, addressed to M. T. Williams, one of the acting canal commissioners, the following letter:

*"CINCINNATI, *December* 15, 1829. [384

"MR. M. T. WILLIAMS—*Sir:* According to the final location of the canal from Main street unto the Ohio river, in this place, there will be a fall from thirty-three to forty-four feet on my land. About one-half of this is above high-water mark in the Ohio river, and the other half below high water.

"I make the following two propositions to the canal commissioners, to wit: 1. I will convey to the state as much ground as will be necessary to employ one-half the water on each of these falls, which can be used for hydraulic purposes at this point: say, six, seven, or eight lots, fifty by seventy feet each, as marked on the plat herewith sent, and I will lease the balance or the other half of the water, for which I agree to pay at the rate of two hundred and fifty dollars per annum for every one hundred and fifty cubic feet of water on the upper fall of sixteen feet or upward, and one hundred and fifty dollars per annum for the same quantity of water and height of fall on the lower seats or falls.

"Or, 2. I will lease all the water at these seats, and pay the above rates, without granting any land to the state. One-third part of the rent is to commence at the time the water is delivered at the seats for operation; one-third one year thereafter, and the last third when the canal and the locks are completed between Main street and the river. Your obedient servant,

'MARTIN BAUM."

Williams laid this proposition before the board of canal commissioners in a few days after its date, and was advised by them, without resolution to that effect, to accept the first proposition made; and in March, 1830, verbally notified Baum of his acceptance, and from thence until Baum's death, he considered it understood by Baum and himself, that the state had a right to a title for said lots, when demanded, and that Baum had a right to a lease of the water privilege, upon the conditions named in the letter; but it was agreed, orally, that the title for the lots should remain in Baum until the arrangement and position of the locks should be definitely established, as it might be deemed best to modify their shape and position, to accommodate the interest and con-

venience of the parties. It was further orally agreed, that S. Farrer, the engineer then in charge of that part of the canal, 385] should finally modify and lay out the *lots to be conveyed to the state, as he might find most convenient for the application of the surplus water to hydraulic uses; and that no more ground should be conveyed than he should determine to be necessary for such application of one-half of the water; but such quantity, if not greater than the largest quantity proposed in the letter, should be conveyed. The price proposed to be paid for the water rent was as high as was paid for such privileges at any point on the canal. No time was agreed upon for the completion of the canal, or within which the water should be supplied for use.

Farrer, the engineer, and Baum in his lifetime, made a plat of the ground through which the canal runs, marking out the streets, alleys, lots, canal-locks, and mill-race; designating, among other things, the six lots named on the plat given to Williams, and also three other lots of sixty by eighty feet each, adjoining one of the locks. The six lots designated, Farrer adjudged necessary for the purposes contemplated in the letter of Baum, and he considered the plat to the extent of the six lots final; but it was afterward agreed between him and Baum to leave the matter open for further negotiation as to the exchange of some of the lots on one side of the canal for some on the other.

The canal through these grounds was not completed until after Baum's death, nor when the suit was commenced; and the water is not yet prepared for use.

On this state of the case the state has filed her bill, alleging that the administrators of Baum, and the heirs, some of whom are married, decline applying to the court of common pleas for power to convey these lots, and praying a decree for a "a specific performance of the contract," and a conveyance "for the land Baum agreed to convey, being the eight lots designated on said plat."

V. WORTHINGTON, for the state.

J. CASWELL, for the defendants.

N. WRIGHT, on the same side.

S. P. CHASE, on the same side.

*Judge WRIGHT delivered the opinion of the court: [386

The counsel for the state urge a decree for the conveyance, because there was a contract between the parties which has been executed by the state; and insist that the statute of frauds and perjuries has no application to the case, because the proposition of Baum is in writing signed by him, and itself a contract; or, if held otherwise, that the statute of fraud and perjuries does not apply to the government, or regulate contracts made with it; and, in case this shall not be set up as a valid contract, that then the right of the state may be established, on the ground that this land has been dedicated to the use of the state.

We are unable to see what there is in the transaction disclosed, authorizing this court to interfere on the ground of a dedication to the public. The letter, if of any legal efficacy, is a proposition for a contract, and must be regarded only as such.

The assumption that the state, more than individuals, may enforce oral contracts for land, and is exempt from the provisions of the statute of fraud and perjuries, is too novel to be hastily adopted by this court. The claim for the state, that she may enforce descriptions of contracts against individual citizens, the execution of which, as between individuals, tends so strongly to encourage fraud and perjury as to require the special interference of the general assembly, does not recommend itself to a favorable regard upon the first presentation of it.

It is, however, not necessary to discuss those questions, as the case may be disposed of upon acknowledged principles without. Equity will exercise a sound discretion in decreeing a specific performance of a contract, and will often refuse a decree and leave parties to their legal remedy, even where the circumstances would not warrant the setting aside the contract. 6 Johns. Ch. 111; 1 Cox, 402. So where the case is hard and unconscionable, or destitute of equity, the parties will be left to their remedies at law. 4 Pet. 328. They will be left where the agreement is voluntary without consideration paid, or defective in its terms, unless there is fraud, accident, or some unfairness alleged. 4 Johns. Ch. 499. So, if the terms of the contract be uncertain, though reduced to writing. 2 Sch. & Lef. 7; 1 Ves. Jr. 326; and equity will not supply the ambiguity. Bunb. 65; 1 Ves. & Bea. 524; 5 Pet. 276. An agreement must be certain, fair, and just in all its parts, or a performance will not be decreed.

387] *Apply these principles to the case before the court. What certainty is there in the alleged contract? Baum made a proposition for a contract, which required subsequent arrangement to adjust its details and settle its terms. The precise land intended to be granted, its quantity, location, the time, and the water to be used, were all left open and unsettled when Baum died. The location of the mill-race, streets, and alleys were, it is true, settled in his lifetime; all the other matters remained at the time of his death subject to modification. Nor has the state performed, or made certain, its part of the contract. The canal was not finished at the commencement of the suit. It is only alleged to be in such a state of forwardness that the state will want the land, and be able to supply the water in the course of the coming summer, though she knows not exactly when the water can be used, or what quantity can be furnished to the Baums on lease, in execution of her part of the agreement. There is no certainty in this alleged contract. It is voluntary and hard; and the court is prematurely applied to for relief.

It is also without mutuality. A specific performance will not be decreed when the remedy is not mutual, as if only one party is bound by the agreement. 1 Johns. Ch. 282, 370. This contract would not be enforced by Baum's heirs against the state, even if, not being sovereign, she could be sued. She incurred no obligation to do anything. As a purchase of land for hydraulic purposes, it is invalid without the sanction of the governor, which has never been given to it.

Upon the whole, then, we think the contract imperfect and inchoate—hard and voluntary—without mutuality; and on either ground not to be decreed. As a donation, it can not be decreed. As a dedication, the claim is wholly destitute of legal foundation. If loss has accrued to the state, by reason of the imperfect state of papers or contract at the death of Baum, she must bear it. This court will not shift it from her to Baum's heirs.

The bill is dismissed.

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*GEORGE AUSTIN v. ANSON HAYDEN. [388

Original process issued by a justice of the peace can not be made part of the record, by oyer, on appeal to the common pleas.

In case before a justice for killing a hog, plaintiff may declare in trespass, in the common pleas.

THIS cause was adjourned in the county of Trumbull.

P. HITCHCOCK, for plaintiff.

J. CROSWELL, for defendant.

Judge WOOD stated the case, and delivered the opinion of the court:

The plaintiff brought an action before the justice of the peace, against the defendant, which was tried, judgment rendered for the defendant, and an appeal taken to the common pleas. The transcript certified up by the justice is entitled as follows: "George Austin *v.* Anson Hayden, action on the case, damages twenty dollars for killing plaintiff's hog, May 28, 1833." The plaintiff filed his declaration in the common pleas in trespass for the same cause of action set forth in the transcript.

The defendant craved oyer of the writ issued by the justice, and of the transcript certified to the common pleas, and filed his plea in abatement to the declaration, on the ground of variance between the writ, transcript, and declaration; the cause of action in the writ and transcript being trespass on the case, and, in the declaration, trespass.

To this plea, in abatement, the plaintiff filed a general demurrer, on which issue was joined, and judgment given thereon by the common pleas for the defendant, sustaining the defendant's plea, in abatement, to the plaintiff's declaration.

The plaintiff has assigned for error, on this record:

1. That the court of common pleas erred in overruling the plaintiff's demurrer to the defendant's plea in abatement.

2. That the common pleas erred in sustaining the defendant's plea in abatement.

3. That the common pleas erred in rendering judgment for the defendant, when, by law, it should have been for the plaintiff.

On this record, and these assignments for error, it will at once be perceived that but a single inquiry is presented, which is, how far a plaintiff may vary, in stating his cause of action in his declaration in the common pleas, from the form of action as set forth by the justice in the transcript? This subject has been frequently 389] agitated in the different parts of this state, and *is believed to have been determined in different ways in the different circuits in which it has arisen. The extent of the jurisdiction of justices of the peace, and the frequent appeals taken from their judgments, make it highly necessary the question should be settled by a reported decision.

In forming an opinion on this subject, but little light can be obtained by a reference to any of the English books of practice; but we must look to our own statute, and to our local circumstances, and as far, at least, as reason and propriety will bear us along, and our power exists, view the proceedings of justices of the peace in that light which the exigencies of our community so peculiarly would seem to require. The proceedings of justices of the peace have usually, in our courts, been viewed with a favorable eye, and every reasonable intendment made to sustain them. From the manner in which they are elected, their numbers, and the little business throughout the state which falls to the share of each, it can not reasonably be supposed that they are generally acquainted with the forms of legal proceedings, and apply to their official acts the same rules that we apply in courts of record, and few, very few, of their proceedings can be sustained. This would not do. It would produce much evil, and is not in our vew called for.

So far as the defendant has craved oyer of the writ issued by the justice, and pleaded in abatement for variance between that and the declaration, his plea in abatement is bad, and the demurrer to it properly sustained. The defendant can not crave oyer of the writ issued by the justice. It forms no part of the justice's record. It is not required to be certified up to the common pleas, but remains with the files of the justice. It is, therefore, beyond the reach of the defendant, and, as he can not have oyer of the writ, he can not avail himself of any variance between it and the declaration, by plea in abatement.

It is true, section 44 of the act defining the duties of justices of the peace requires the justice, when an appeal is taken, to certify up the bill of particulars, the depositions, and all other original

papers, if any were used on the trial before him. The bill of particulars is to be certified, because the plaintiff is confined to it in the common pleas; the depositions are to be certified, to be used as evidence on the trial; "and all other original papers, if any used on the trial, means, we think, such papers and instruments only, as were used as evidence on the trial. The writ issued by the justice can not be used as evidence *on the trial; it forms [390 no part of the record, and could not be used in the common pleas, and it can not be supposed the statute required it to be certified to the common pleas, so long as it is perfectly useless to do so. The defendant, then, can take no advantage of a variance between it and the declaration, because he has no right to oyer of the writ.

The transcript is certified up by the justice. It forms a part of the record. It is the process or means by which the parties get before the court. The defendant may crave oyer of the transcript, and if any real, substantial variance exist between it and the declaration, he may plead it in abatement. So liberally do we view the proceedings of parties, however, that it must be clearly such a variance as I have described, or it will not be favorably regarded. The transcript is in this case substantially like the writ; and is there any variance between it and the declaration which the law will not tolerate? In the transcript the suit is described, an action on the case; damages twenty dollars for killing plaintiff's hog. The cause of action, as here laid, is clearly in tort. It is so far described, that the defendant has notice what it is for which the plaintiff complains. Is it possible that he can be misled in the common pleas, if the plaintiff then declares in trespass for killing a hog? Is not the cause of action precisely the same; and the only difference that, in the one case, the damages are immediate, and in the other, consequential? Would it be right? Does good policy, or is there any rule of positive law, applicable to the proceedings of a justice of the peace, that would require him to define the boundaries between trespass and case? A point which it is sometimes difficult for the most learned of the profession to correctly determine. We think not.

Section 44 of the act to which I have reference, it is true, provides "the plaintiff in the court below shall be plaintiff in the court of common pleas, and the parties shall proceed in all respects in the same manner as though the suit on action had been originally commenced in said court." Counsel argue, on this section

of the statute, that as the parties are to proceed in the same manner on the appeal as if the action had been commenced in the common pleas, that taking the transcript for the process, they may avail themselves of any variance between it and the declaration, as if it were an original writ. We do not think so. This section only intends to require that a declaration shall be filed, an issue 391] made up, and the trial *conducted on an appeal, as if the proceedings had been commenced in the common pleas. This seems to us to be the obvious construction, and viewing the proceedings of the justice with certainly but reasonable liberality, there can not be said to be any variance between the transcript and variation, which ought to avail the defendant on a plea in abatement.

In Newland on Contracts it is said the declaration is only an enlarged exposition of the writ, and that the plaintiff may so far vary from the writ in declaring, as to go from assumpsit to debt, and *e converso*, but not from contract to tort. Reasoning from analogy, then, the plaintiff may change from trespass to case, or *e converso;* and although there is no positive written rule to be found to sanction it, it is known to have been the practice in some of the circuits in this state to permit the change from one species of contract or tort to another for many years, and such we think to be the law; but whether a variance from contract to tort or tort to contract in such cases would be sustained, is unnecessary to be decided in this case. It is our opinion that the court of common pleas erred in overruling the demurrer to the defendant's plea in abatement, and the judgment of the common pleas is reversed.

Treon's Lessee v. Emerick.

Levy and sale on execution of a tenant in common's interest, as by specified metes and bounds, is good for his undivided proportion within such boundaries.

Plaintiff in ejectment may recover for any interest he may prove a title to, less than the claim in the demise.

Sixty acres, part of north half section 13, insufficient description of land sold for taxes.

THIS case was adjourned from the county of Montgomery, and came before the court upon an agreed statement of facts.

In 1820, Debart, from whom both parties claim title, conveyed the lands in dispute, being sixty acres, to Regal, Hubbler, and Jacoby. In 1827, Jacoby conveyed his undivided third part to Treon, the lessor of the plaintiffs. In 1820, a judgment was recovered against Hubbler and Regal, upon which execution was issued against them, which, in August, 1820, was levied upon their interest in this land. A sale was effected upon a subsequent execution in 1827, and Treon became the purchaser. The levy is in these words: "No goods levied on forty-three and a half acres of land on the east side of a tract of sixty *acres, that Debart [392 conveyed to Jacoby, Regal, and Hubbler, in the west half of section 13, T. 3, R. 4, east of M. D. Said land to be run off by a line the same course with the east boundary of said sixty-acre tract; said levy is made only to include Regal and Hubbler's interest in said land."

The appraisement under which the land was sold by the sheriff was of an undivided third part of the sixty acres. The sheriff's deed recites the levy truly, and the appraisement of two undivided third parts of sixty acres, and proceeds to convey to Treon "the premises so taken."

The defendants were in possession under a sale for taxes made in 1822. The description of the land in the duplicate and advertisement of sale is as follows: "Not known (owner's name), R. 4, T. 3, S. 13, p. N. half sixty acres."

ODLIN, CRANE, SCHENCK, and STODDARD, for plaintiff:

The agreed case admits the legal title to have been in Jacob W. Debart, on October 8, 1816, and both claim under his title—the plaintiff by sheriff's sale, the defendant under tax title.

The first question that presents itself is, does the levy, sale and confirmation, and deed convey a good title (to the lessor of the plaintiff) to the undivided two-thirds of the sixty acres, of which it is admitted the judgment debtors, Regal and Hubbler, were then seized.

The levy, though it attempts to effect a partition by calling Regal and Hubbler's interest as forty-three and a half acres, is evidently, in intention and fact, a levy only on Regal and Hubbler's interest, and is so declared, being two-thirds of the sixty acres;

the appraisements made appraise the whole land, and deduct the outstanding third of Jacoby. And by the execution of August 9, 1827, under which the sale was made, it appears to have been advertised and sold as the undivided two-thirds of said sixty acres.

The decisions go strongly to sustain the title of a purchaser under a sheriff's sale. In the case of Wheaton *v.* Sexton, 4 Wheat. 503, it is said: "Whether the marshal sells before or after the return, whether he makes a correct return or no return at all to the writ, is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return." This doctrine is 393] recognized in the case of Lessee of Allen *v.* *O. Parrish, 3 Ohio, 191. And it has been frequently decided that the title of a purchaser under a *fi. fa. et lev.* is not affected by an irregularity in the proceedings. 1 Maule & Selwyn, 425; 5 Barn. & Ald. 746; 3 Johns. 97; 1 Gallison, 419; 8 Johns. 361; 1 Johns. Cas. 153.

In the case of the Lessee of Matthews *v.* Thompson and others, 3 Ohio, 272, 274, it is said, "a variance between the levy and the deed may be explained by parol; if the levy was actually on the tract contained within the deed, and that fact was known and understood at the time of the sale, no injustice has been done; an innocent purchaser ought not to suffer by the careless manner in which the officer has returned his proceedings, if, in point of fact, they have been substantially correct."

In the case of Douglass *v.* McCoy, 5 Ohio, 524, that a defect in a levy may be supplied by parol, and that proof was the order of confirmation, identifying the land, which was carried into the deed, and, in the absence of proof, would perhaps lead the court to presume, if necessary, that the part conveyed was the part appraised, and was duly described in the advertisement. The levy is made upon a tract of sixty acres, described to be conveyed by Jacob W. Dehart to Jacoby (1), Regal (2), and Hubbler (3), and declares that it is made to include Regal and Hubbler's interest; that interest from the statement of the conveyance itself, contained in the levy, is two-thirds of the whole sixty-acre tract. It may be contended that the levy was upon the two-thirds interest in the forty-three and a half acres part of said tract.

To this it is answered, that in the cases above cited of the Lessee of Matthews *v.* Thompson and others, and Douglass *v.* McCoy, the court have said, that a defect in a levy may be supplied

by parol. However defective the amount of interest levied upon may appear in consequence of not naming at first sixty acres instead of forty-three and a half, yet the object and intention of the sheriff is explained and rendered manifest by the appraisement which he made (and of which the court have the original), by immediately causing his appraisers to appraise the whole sixty acres, and the deducting one-third for the outstanding interest of Jacoby, and by the fact that it was advertised and sold as the two-thirds of sixty acres, or rather as the undivided interest of Regal and Hubbler, in the whole tract of sixty acres. If, then, any doubt rested upon this levy, *the officer has himself explained it; [394 as such the court confirmed the sale, and if the act of examination and confirmation by the court, and an order to make the deed for the undivided interest of Regal and Hubbler, is to be of any value to an innocent purchaser, surely it is not contending too much to say, that the court were satisfied that the levy was upon the undivided two-thirds of the whole sixty acres, and so ordered the sheriff to convey, and thereby established and confirmed the construction placed upon the language of the levy by the plaintiff's counsel, and which construction may be fairly and properly drawn from that levy.

In the language of the court in Matthews v. Thompson, before cited, it has been fully appraised, and fairly sold. No injustice has been done, and an innocent purchaser under such circumstances ought not to suffer.

If, however, the court should differ from the plaintiff's counsel and should be of opinion that the levy was a levy only upon Regal and Hubbler's interest in the forty-three and a half acres part of said tract of sixty acres, they still claim to recover under the authority of the case of the Lessee of White v. Sayre, 2 Ohio, 110.

2. By the agreed case the lessor of the plaintiff presents an undisputed legal title to one-third of the premises, by deed from Jacoby. But it is understood by a memorandum of objections furnished by defendant's counsel, that upon that he can not recover, because, say counsel, the demise laid in the declaration is for the whole sixty acres, and not for an undivided interest.

It is supposed that this objection is decided against the defendant beyond all controversy or cavil.

In the case of the Lessee of White v. Sayre, before cited, 2 Ohio, 115, Judge Burnet says, "if a person declares for an entire tract,

and proves title to a moiety only, he shall recover so much; and again, the point can admit of no doubt, the plaintiff must recover according to his title," and cites 2 Lev. 334; 2 Bibb, 350; Bull. N. P. 109. In Burgess' Lessee *v.* Purvis, 1 Burr. 326, Lord Mansfield says, "it is an exceeding plain case, that part may be recovered on a demise of the whole.

In Adams on Ejectments, 188, it is said, "under a demise for the whole, an undivided moiety may be recovered." Doe, on the demise of Bryant, *v.* Whipple, 1 Esp. 330; Jackson *v.* Sidney, 12 Johns. 185.

395] *It is contended, then, that the lessor of the plaintiff, has shown a legal title to recover at least a part, unless he is barred by some other cause than the objections urged to his title.

For this purpose the defendant sets up a title derived from a sale for taxes delinquent in the years 1820-21.

"This title can not be established unless he shows the authority of the collector and the regularity of his proceedings. Great strictness has always been observed. The purchaser buys at his peril; the maxim, '*caveat emptor*,' applies." Lessee of Holt's Heirs *v.* Hemphill's Heirs, 3 Ohio, 234.

Under the provisions of this act, by the extract from the duplicate of 1820, it appears: "Dechant—60, 1, 2, 3—R. 4, T. 3, S. 13—for N. half—$1.50.

And on the duplicate of 1821, it appears that the name of "Dechant" was omitted, notwithstanding the positive requisition of the statute, and entered thus: ⋈—60, 1—R, 4, T. 3, S. 13—for N. half—$2.86.5.

It also appears by the certificate of extracts, and copy furnished by the county auditor for the court in bank, and which have been forwarded, that although a certificate of an oath was attached to the duplicate, as required by section 30, yet that it was never sworn to. This fact does not appear by certificate furnished by defendants, but is apparent by the one furnished the court by plaintiffs.

The land was advertised for sale, as follows: "Not known—R. 4, T. 3, S. 13—for N. half—60, 1—$4.14.4—sold."

It is objected: 1. That the land was not properly listed under the statute, the owner's name being known, as evidenced by the duplicate of 1820, "Dechant."

2. That the list of delinquent lands was never sworn to as required by the statute, section 30.

3. That the land was never properly described by quarter section or lot, nor is stated whether east or west of Miami river; there being a similar section, range, township, and quarter east and west of said river. See Hough and Bourne's map of state and section.

4. That it was never advertised in a paper at the seat of government.

Upon the objection that the land was not described by quarter or lot, we confidently rely as defeating the defendant's title; it is listed in direct opposition to the words of the statute, which requires that the quarter section or lot shall be designated; it affords no notice to the owner: "Not known, sixty acres," *part [396 of the north half of a section could convey to Dechant no information. In Lafferty's Lessee v. Byers, the court say, "that the description should be such that the owner may know that the tax is unpaid on his land; and that the purchaser may know or learn the precise tract intended, and be enabled to estimate its value." Lessee of Matthews v. Thompson, 3 Ohio, 569; Lessee of Massie's Heirs, 2 Ohio, 293; Ronkudorff v. Tayton's Lessee, 4 Peters, 350.

Fales, and P. P. Lowe, for plaintiff:

The deed from sheriff to plaintiff is of two undivided third parts. The levy was made on a several interest, not an undivided one. If a deed by a private individual had been made with a similar description, showing, as in this case, from what part of the tract the land was to be taken, such a deed certainly could not convey an undivided interest. If this view is correct, the undivided interest of the two defendants was not levied on. The land was held in common, and they had a common interest in every part of it until there was a partition. The interest levied on and that sold were entirely different. Two-thirds of an undivided interest in sixty acres were sold, and forty-three and a half acres of the same by metes and bounds were levied on. The interest of Jacoby was levied on and sold, inasmuch as he had an interest in the forty-three and a half acres as much as in any other part of it. That interest of Jacoby, being a tenant in common of the whole, could not be levied and sold, as the judgment was not against him. 3 Ohio, 196. Levy of an execution upon the lands and a sale by the officer are essential to a purchaser acquiring the same interest in the land that the judgment debtor had. French v. Lord, Adams 42. An execution against one holding land as a tenant in com-

mon can not be extended on a part of the land as holden by metes and bounds. 12 Mass. 348. Execution against the land of a joint tenant or tenant in common can not be levied upon any particular portion of the land; it must be levied on the debtor's share of the estate in the whole land. 2 Conn. 213, 244, in notes. Lands of one tenant in common can not be extended by metes and bounds, but the execution must be spread over the whole land, and such undivided proportion thereof must be set off to the creditor to satisfy his debt. 4 Greenl. 230. Rules of construing conveyances by 397] deed and extent are *the same. The number of acres levied on was more than the proportion of two defendants in the execution in the tract. The judgment and the execution being against two of the tenants in common, the interest of the other tenant in common, Jacoby, could not be sold, and the sale, therefore, could not be valid, as his interest was in fact sold, that interest being an undivided third part of the whole tract. Tenants in common may have a partition. If a levy and sale founded on it like the present should stand, it would defeat the rights of the tenants in common. J. W. Dechant and wife conveyed by deed, bearing date February 3, 1820, to Henry Jacoby, Matthias Rigel, and Michael Hubbler, recorded September 21, 1820, the premises in dispute. The part levied on is described very particularly in the levy. The description applies to the whole tract, and the meaning of it can not be controlled by the concluding words in the description. If the sale of the sheriff is void as to two-thirds of the tract, it is further insisted, on behalf of the defendant, that the plaintiff can not recover the third part of the tract conveyed to him by Jacoby by deed, under the declaration in this case, because it is a rule of law, that when the plaintiff sues for an entire tract, he can not recover an undivided portion. 4 Stark. Ev. 541, n. 1. Where an entirety is demanded in ejectment, there can not be a recovery of an undivided part, the notice of such recovery being considered different from that of the claim. Young *v.* Drew, 2 Hayw. 100. Evidence of title to an undivided moiety in ejectment will not sustain a count for the whole tract. Carroll et al., Lessee, *v.* Norwood's Heirs, 5 Har. & J. 164. If a person claims one hundred acres, less than one hundred may be recovered. If he claims an undivided moiety, an undivided third may be recovered, or any undivided portion less than a moiety, but he can not recover an undivided part, when he claims an entirety, nor an entirety when he demands an undivided por-

tion. 7 Har. & J. 208. Where an entire tract is sued for, less than the whole may be recovered, but it must be an entire and not an undivided interest.

Again, the defendant insists that he has a good title to the premises in dispute. They were conveyed by deed in fee simple on a *bona fide* purchase to him by Elisha Brabham. They were sold to said Brabham by the auditor of Montgomery county for taxes, and a deed made to said Brabham for the same by the auditor of Montgomery county agreeably to law. The *validity of [398 the tax sale is resisted by the plaintiff. On behalf of the defendant, it is insisted that the title by the tax sale is good and valid. The evidence necessary to support a tax title is stated in the following case: Lessee of A. Carlisle *v.* N. Longworth, 5 Ohio, 374. The court say that before the deed made by the county auditor can be received in evidence, it must be shown that he had authority to make it. And that that is done by showing that the lands have been advertised and sold for the taxes, and that all that is required to be made matter of record in the auditor's office, and that there can be no difficulty in procuring the evidence, and that in connection with this preliminary evidence, the deed will be received, and the legislature has declared its effect.

The evidence required by the court in support of a tax title in the preceding case, is furnished by a certified copy of the record of the county auditor of Montgomery county. It appears by that, that the lands had been advertised, except at Columbus, and sold for the taxes of 1820 and 1821. With this evidence, if the advertisement at Columbus was unnecessary, the tax title in this case is sustained agreeably to the rule laid down in the last case. The law, as observed by the court in the said case, has declared the effect of the deed of the auditor, see 18 Ohio L. 85, section 40, that all deeds of land sold for taxes, shall convey to the purchaser all the right, title, and interest of the former proprietor in and to the land so sold, and shall be received in all the courts as good and sufficient evidence of title in such purchase.

Judge LANE delivered the opinion of the court:

The levy appears to have been made with the intention of covering the whole interest of Regal and Hubbler in the sixty acres. But it is so made as to fail in effecting that object. Regal and Hubbler held a joint interest with Treon, the purchaser from

Jacoby, and this joint interest could not be separated by a levy, without investing the sheriff with an *ex parte* power of making partition. The levy is specific and confined to forty-three and a half acres. The boundaries are specially defined, and consequently the levy does not touch the remainder of the tract. The question then arises, whether these proceedings convey the land within them? We consider this point decided by the case of 2 Ohio, 113. There a majority of the court held, that a deed which 399] purported to convey an estate in severalty, *in which the grantee held a tenancy in common, was operative to pass the interest of the grantor to his undivided part within the limits described in the deed. The deed of the sheriff operates in the same way, and conveys to the purchaser two-thirds of the forty-three and a half acres of land.

In this view of the case, the plaintiff is entitled to forty-nine acres of the sixty, and not to the whole tract as he claims. Yet he is permitted to recover to the extent of his proof of title. The verdict and judgment may be for any amount of land less than the whole quantity claimed in the demise. 2 Stark. Ev. 540.

The tax title set up by the defendant can not be sustained. The description in the duplicate and advertisement is too vague and uncertain: "Sixty acres, part of the north half section 13." Which sixty acres, is an inquiry natural to be made. In Lafferty *v.* Byers, 5 Ohio, 458, it is held that such description is too general. The tax sale must be held void.

Judgment for the plaintiff.

Defendant asks, and is allowed the benefit of the occupying claimant law.

George Hurley *v.* The State of Ohio.

In a capital case, where the jury state they can not agree, the court may, in their discretion, discharge them, remand the prisoner for another trial, and continue the case.

Plea of *autrefois acquit*, must set forth not only the verdict of the jury, in the former trial, but a judgment thereon, or it is bad.

The indictment does not aver, that the grand jury were impaneled and sworn to inquire of crimes and offenses committed within the body of the county, is not error.

When the indictment contains three separate counts, and the jury say they find the defendant not guilty on the first, but can not agree on the other counts, it is not error for the court to refuse to receive the verdict and have it recorded.

It is not error which will sustain a motion in arrest, that the traverse jury were not summoned within the time specified by the statute.

THIS case was adjourned from the county of Highland. It was a writ of error made returnable to this court. The facts, as they appear of record, are these: The grand jury at the March term of the court of common pleas of Highland county, 1834, returned a bill of indictment against the plaintiff in error, containing three counts. The first count charged the plaintiff with murder in the first degree; the second, with *murder in the second degree, [400 and the third, with manslaughter. The plaintiff was put on his trial, at the same term, before the jury, who, having heard the evidence, retired to deliberate, and having been some time absent, returned into court, and stated that they were unable to agree. The record states that the jury were then separately and collectively called, when they informed the court that they had agreed that the plaintiff was not guilty on the first count, but that they were not able to agree on the other counts, and that the court then continued the prosecution, and discharged the jury, on the motion of the prosecuting attorney, and against the consent of the plaintiff. The counsel for the plaintiff in error then moved the court to enter on the journal the verdict of the jury on the first count, which the court refused.

At the succeeding term, the accused, by his counsel, filed two special pleas in bar: First, that the accused at the former term was arraigned on said indictment, plead not guilty, and was put on his trial; that the jury heard the evidence, retired and returned into court, were called and answered collectively and separately that said defendant was not guilty on the said first count, and thereupon the court discharged the said jury, on motion of the prosecuting attorney; that said indictment and said count, on which he was tried and acquitted, were the same, etc., on which it was now sought to again put him in jeopardy.

The second plea in bar set up, that the accused was, at a former term, placed on his trial before the jury, and, after the jury had

heard the evidence, the court, against the consent of the accused, on motion of the state, discharged the jury, etc.

To these pleas in bar, the prosecuting attorney demurred, and the plaintiff in error joined in demurrer. The court sustained the demurrer to the special pleas, and the accused was placed again on trial.

On this second trial, the jury acquitted the plaintiff in error, on the two first counts of the indictment, and convicted him of manslaughter, the offense charged in the third count.

The counsel for the plaintiff in error then submitted a motion for a new trial, for the following reasons: 1. That the verdict was contrary to the evidence. 2. That the jury were illegally impaneled, because no new venire was ordered, when the jury were discharged, that had been sworn. 3. Because the jury mistook, or did not remember one important part of the evidence for the 401] plaintiff in error. 4. Because the verdict *is contrary to law. 5. Because new testimony has been discovered since the trial. 6. Because the jury was not unanimous. This motion was overruled by the court, and a motion in arrest then filed, for these reasons:

1. That it appears from the record, that the plaintiff in error was put on his trial, on a plea of not guilty, and acquitted by the jury at the March term, 1834, of the court, on the first count of the indictment which included the offense set forth in the two other counts.

2. Because the indictment was not continued, or a new venire ordered, at the said last March term, 1834.

2. Because the court erred in sustaining the demurrer to the pleas in bar.

4. Because the plaintiff in error had, at the March term aforesaid, been tried and acquitted, and was again put in jeopardy of his life by a second trial on the same indictment.

5. Because the indictment does not state the grand jury were sworn to inquire of crimes and offenses committed within the county of Highland.

This motion, in arrest, was also overruled, and the plaintiff in error sentenced to imprisonment in the penitentiary.

These are, we believe, the facts and circumstances, so far as they are shown by the record, which attended this trial from its commencement to its termination in the court of common pleas. The

plaintiff now prosecutes his writ of error to reverse this judgment, and has assigned for error: 1. That the court below erred in discharging the jury, at the March term, 1834, without the consent and against the wishes of the plaintiff in error. 2. That the court erred in not entering judgment of acquittal on the first count of said indictment, according to the opinion and finding of the jury, at the March term, 1834. 3. That the court of common pleas erred in sustaining the demurrer to the said special pleas. 4. That the court of common pleas erred in not granting said plaintiff in error a new trial, for the reasons assigned at June term, 1834. 5. That the court of common pleas erred in not arresting the judgment for the reasons assigned at June term, 1834. 6. That it is not averred in the indictment that the "grand jury" were impaneled and sworn to inquire of crimes and offenses committed within said county of Highland; nor for any particular county, district, or place.

*Collins and Collins, for plaintiff in error. [402

Scott, prosecuting attorney.

Judge Wood delivered the opinion of the court:

The first error assigned on this record presents the question, whether the court can discharge the jury after they had been once impaneled on the trial of a criminal cause without a discharge of the defendant? If they have not this power, the court were clearly in error in putting the plaintiff in error a second time on his trial in this indictment, for no rule is better settled than that which prohibits putting a person twice in jeopardy for the same crime; and our constitution is nothing more than the recognition of the common law principle on that subject. Have the court, then, the power where the jury are unable to agree, or for any reasonable cause, to discharge them, continue the prosecution, remand the prisoner, and try him at a subsequent term. There have, in modern times, been several decisions in England, which seem to sustain the course pursued by the court below. In the case of the People v. Olcott, 2 Johns. Cas. 301, Kent, Justice, in delivering the opinion of the court, says, that the position, generally, denying the power of the court to discharge a jury, sworn and charged in a criminal case, has originated from a dictum to be found in the

institutes of Lord Coke, and that this dictum rests on his single authority, without the sanction of any judicial decision. On the other hand, he says, there are many authorities which establish the power of the court to discharge the jury in capital cases. It was done in the case of Ferreus, cited in Sir Thomas Raymond; in 1 Ventris, 69, and in Foster, 271, which was a case of murder. In Salkeld, 646, and 2 Hale's P. C. 295, it is said, in direct opposition to Coke, that the practice had been common for the court, after the jury were sworn and charged and evidence given, to discharge the jury and remand the prisoner for another trial. In Foster, 22, in the case of the two Kinlocks, ten judges against one held, that the rule as laid down by Coke, that the court had not this power, had no authority to support it. That these cases are not capable of being determined by any general rule, for none could govern the discretion of the court, in all possible circumstances. Many other cases are stated in the books where this power may be exercised, besides the one mentioned in 403] this record.; 1 Camb. 401; in Rellinge, *26; 2 State Tr. 710, 827, this general power is recognized. 1 Hale, 35, if a prisoner be found insane; Leach, 443, or in a fit; Fowler, 76, or be taken in labor; or if a juror escape from his fellows, or be intoxicated; in all these cases it has been held, that the jury may be discharged, and the prisoner remanded for another trial. In New York, in the People *v.* Olcott, the jury could not agree, and the court determined the power to discharge, and against the consent of the defendant, was not to be denied. The power of the court, in such cases, is analogous to their power in civil cases, and they possess the same power and control over the verdict. 6 Johns. 88. In New York, 18 Johns., the whole doctrine on this subject, in the case of the People *v.* Goodwin, was ably discussed, and all the leading authorities reviewed by Justice Spencer, and the law settled, as it had been before pronounced, by Justice Kent, in the case of the People *v.* Olcott. In Massachusetts, Commonwealth *v.* Bowden, 9 Mass. 494, Judge Parsons says, it would not be consistent with the genius of our government or laws to use compulsory means to effect an agreement among jurors. After these solemn adjudications, it would require a bold man, in the exercise of his judicial function, to depart from principles they appear so conclusively to establish. No error, then, is perceived by us in the decision of the common pleas in discharging the jury

when they could not agree, and remanding the prisoner for another trial.

The next assignment for error is, that the court refused to have the verdict of the jury acquitting the plaintiff in error, on the first count in the indictment, entered on the journal.

On this point we can find no decided case, and it must depend on the general analogies of the law. There are many authorities to this point, that the rules of evidence and proceeding, the power of the court over the jury, the verdict of the jury, and the right to grant new trials, is the same in criminal as in civil cases. 6 Johns. 688; Jones, 163; Caine's Ab. 478. Suppose, then, a civil case, a declaration on several separate contracts, with the proper count for each, and the jury having received the cause, should retire and again come into court and say that on one count they found for the defendant, but on the others they could not agree, could the court legally receive such verdict? If so, they must discharge the jury, continue the cause, and try it on the other counts at the next term. We think no precedent of the kind can be found. *We apprehend the case is not changed in the reason which [404 should be applied, because this case wears a criminal form. A verdict in either a civil or criminal case must be considered an entire thing. It must respond to the whole declaration, and to every count in the indictment, or the court can not legally receive it as the verdict of the jury. Indeed, this court has decided, in several instances, if the verdict does not respond to an issue of fact, made by the defendant in civil cases, it is error. In this case the record shows that the jury could not agree on a verdict on the last two counts in the indictment; and having agreed on the first, was no reason why the verdict should have been received. It was in law no verdict, and the court did not err in rejecting it altogether.

The third assignment is that the court of common pleas erred in sustaining the demurrer to the special pleas. We have carefully examined this point, and have substantially disposed of it in our remarks on the other two points. The first plea is intended as a plea of *autrefoits acquit*. It sets up the statement of the jury, that they agreed the plaintiff in error was not guilty on the first count, and avers that such acquittal was an acquittal on all the counts. This plea avers that there was the verdict of the jury only. The reason why it is bad on its face is, that it was not then

a judgment of the court on that verdict. In 2 Hale's Pleas of the Crown, 243, the law is given as thus: "But it is to be known that there must not only be an acquittal by verdict, but a judgment thereupon, *quod eat sine die*, for the bare verdict of his former acquittal is not a sufficient bar, without a judgment pleaded also."

The second plea states only that the jury were impaneled and sworn, heard the evidence, and were discharged without delivering their verdict. The general authority and discretion of the court to discharge the jury renders this plea also insufficient. If the circumstances of the case were such that it was arbitrary, tyrannical, and oppressive in the court to discharge the jury, the plea should show the facts, which it does not do. The demurrer was then properly sustained.

The fourth assignment is, that the court of common pleas erred in not granting the plaintiff a new trial for the reasons assigned. The granting of new trials is a matter addressed to the sound discretion of the court, and it is extremely difficult in most cases to reach and revise the result of the exercise of that discretion on 405] error. It is true their discretion is a *legal discretion, and cases may arise where its exercise would be so manifestly erroneous that error would lie for such decision, but it seldom occurs. The first point made in the motion for a new trial is, that the verdict of the jury is against the evidence. The record furnishes us no proof what the evidence was on the trial, and we can not say that the court of common pleas erred in refusing the motion on that point. The second reason assigned for this motion is, that the jury were illegally impaneled, because no new *venire* was ordered when the first jury were discharged. It is a sufficient answer to this objection that it was not taken by the plaintiff in error when the jury were impaneled, and if it were an objection by his not making it then, it is clearly waived. The plaintiff in error, as the record shows, was tried by a jury of his own selection. The third reason for the motion is, that the traverse jury mistook an important fact; and the fifth, that new testimony has been discovered. On neither of these points does it appear, from the record, that the common pleas had any evidence to sustain these points in a motion for a new trial.

The remaining point in the motion for a new trial was, that the verdict was against the law, but of this we have already disposed.

We can not discover from all the reflection we have been enabled to give this subject, that the court of common pleas have not violated any known rule of law, nor deviated from the exercise of a sound legal discretion, in overruling the motion for a new trial. It is also said the jury were not unanimous in the verdict; but this is denied by the record, and does not aid, therefore, the plaintiff in error.

The next assignment for error is, that the court did not arrest the judgment for the reasons filed. This motion in arrest presents but one question, but what is assigned for error. It is alleged in this motion, that the prosecution was not continued when the first jury were discharged; and they urge, therefore, that it was discontinued and out of court. It is unnecessary to discuss the effect of such an omission in this case, because the record shows in express terms a continuance.

The only remaining assignment for error is, that it is not averred in the indictment that the grand jury were impaneled and sworn, to inquire within and for the body of the county of Highland, and this assignment can scarcely require notice. The law points out the duty of the grand jury, the law requires them to inquire within and for the body of the county, *when they [406 are impaneled, and for no other county; to her they are impaneled and sworn, therefore, the law presumes the purpose, and it is not error, any more than it would be to omit to state their number, to omit an averment of the purpose for which they are impaneled, when they can under the law be impaneled for no other purpose.

The whole case, then, is disposed of. We find no error in the record, and the judgment of the common pleas is affirmed, with costs.

Ellen Wilcox v. Lucius Balger.

A general decree in a suit by purchaser of land asking specific performance, can not be avoided by investigating the grounds upon which it was decided, in a new bill in relation to the same matter.

This cause was adjourned from the county of Ashtabula. The

bill states that in September, 1820, defendant, in consideration of eight hundred and forty dollars then paid, and three hundred and forty dollars to be paid him by one J. Bidwell, one-half in March, 1823, and one-half in March, 1825, agreed (in writing under seal) to sell to said Bidwell ninety-two acres and eighty rods of land in Kingsville, in said county (particularly described); that by said agreement, Balger was to make Bidwell a decree of said land on March 10, 1821, and to permit Bidwell to take immediate possession of the premises, and exercise all acts of ownership (the written agreement exhibited); that Bidwell did take immediate possession of the land, made valuable improvements, and kept possession until May, 1825; that Balger has never made deed to Bidwell; that Balger was unable to make deed until four or five years after March, 1825; that on May 5, 1825, Bidwell assigned to complainant all his interest in said land and said contract for a valuable consideration, whereupon the complainant took possession of the land, made valuable improvements, and kept possession of the same until the term of the common pleas of said county, for 1827, when he was ejected by suit of Balger; that the complainant has been prevented from making full payment for said land, by misrepresentations and fraudulent practices of Balger; that since the complainant was so ejected, Balger has been in possession, received the rents and profits of the value of
407] seventy-five dollars per year; *has taken therefrom fruit trees of the value of fifty dollars, and cord wood of the value of fifty-nine dollars; that on September 25, 1832, complainant made a tender of the balance of the purchase money due on said contract, after deducting for rents, profits, cord wood, and fruit trees, and demanded deed; that complaint has offered, and is now ready to pay any balance of money due for said land. The bill prays an account of the balance due on the contract, conveyance, and general relief.

Abstract of the plea: That complainant filed his former bill in the common pleas, against the defendant, in 1823, setting forth that in the year 1820, he made his bond to Truman Bidwell for one thousand dollars, conditioned that if the said Bidwell should pay to Balger one hundred and seventy dollars in two years, and like sum in four years from date, that Balger should convey to said Bidwell the land in said bond described. And said former bill alleged that Bidwell entered into possession of the land, and

made improvements, and kept possession until 1823, when Bidwell, for valuable consideration, transferred to complainant all his interest in the land and bond. That complainant went into possession, kept possession, and made valuable improvements; further alleged that complainant had paid to Balger full amount due for said land, which was accepted by Balger in full satisfaction. That complainant had well hoped, etc., that Balger had refused to convey the land, etc., and the prayer of said former bill was that Balger should make answer, and be decreed to convey, and for general relief.

The defendant, at November term, for 1823, filed his answer to said former bill, confessing said bond and contract as charged in said bill. That a conveyance to Bidwell was to have been made in March, 1823, and alleging that there were two notes given for the balance of the purchase money for the land. Admitting that defendant had not conveyed, but averring that at the date of said note, Bidwell gave defendant a bond for payment of the balance of purchase money, which was agreed to be secured by mortgage deed of fifty acres of land. That Bidwell, at the time of making said contract for said land, knew that Balger was to obtain a title from one Corwin before conveyance could be made to him. That Balger got title, and was able to convey to Bidwell in 1823. Said answer admitted the assignment of Bidwell's interest to complainant; that Bidwell had possession, but denied making improvements, and averred non-payment of the balance of the purchase money. *That immediately after Balger obtained title he [408 offered to convey the land to Bidwell; that Bidwell declined receiving deed, saying he had assigned his interest to E. Wilcox; that defendant offered to complainant to convey said land, and requested him to give mortgage to secure payment of purchase money, but complainant refused; and that defendant was and still is ready to fulfill his agreement, and would produce here, in court, a deed of the land to be disposed of at discretion of the court. Denial of fraud, combination, etc.

And the plea avers, that complainant filed his replication to said answer, and that at the April term said former cause was heard and a decree rendered in favor of defendant. That appeal was, by complainant, taken to the Supreme Court. That at the August term of this court, 1825, the former cause was heard on bill, answer and replication, proofs and exhibits, and submitted

to the court, and a decree rendered upon the merits. That it was adjudged and decreed that the equity was with the defendant, and that the bill be dismissed at the cost of the complainant, as appears by plea; avers that the land and contract described and set forth is the same as those in former bill, and that the whole subject matter of this suit is the same as that of former.

Complainant demurs: For cause of demurrer says, that from the showing of said plea the only matter of issue upon the former suit was payment of the balance of the purchase money. That this being found against complainant, as appears by said record, this court could render no other decree than that of dismissal. The complainant, not having offered, in his bill, to pay the same, and that from the whole proceedings in said former suit, as set forth in said plea, said complainant ought not to be barred of his present suit.

———, for complainant.

HITCHCOCK, for defendant.

LANE, J., delivered the opinion of the court:

The complainant demurs to this plea because it appears, from the decree, that it was dismissed for non-payment of the purchase money, and that the contract remains unaffected by the decree. 409] *We think the dismissal is a bar to future proceedings. The rights of the parties were before the court, and all were investigated, and the plaintiff must abide by the shape in which he chose to submit them. Like a bill to redeem a mortgage, if it be dismissed without reservation for non-payment of the money within the time limited, it is a final decree, and works a foreclosure because it concludes all rights. 4 Johns. Ch. 140.

THOMAS EARL'S LESSEE v. JACOB F. SHOULDER.

Proofs other than memorandums in writing on the minutes of the court of common pleas, to show that a mandate to carry a judgment of the Supreme Court was issued, admissible. An execution issued upon it, and a

levy made on such execution, may be submitted to a jury, and the facts may be rightfully so found on such proofs.

Good practice requires of the clerk of the Supreme Court to add to the final record of appeal causes the order for a mandate to court of common pleas; and of the latter clerk to minute on the journal the judgment of the Supreme Court, the receipt of the mandate, and the order for execution.

Where facts are disclosed on a motion for a new trial, affirming the correctness of the verdict, a new trial ought not to be granted, whatever errors may have intervened.

Answer in chancery, by a defendant in ejectment, in a chancery case on the same subject, is admissible as proof of his declaration.

THIS was an action of ejectment in the county of Ross. Verdict for the plaintiff, and a motion for a new trial, which was adjourned for decision here. Judge WRIGHT thus stated the case:

On trial the plaintiff offered the following evidence to the court and jury:

1. The record of a judgment in the Supreme Court, in favor of Harris *v.* John Carlisle, in a case brought into that court by appeal from the court of common pleas, rendered at December term, 1822.

2. The clerk of the court testified that the execution which issued upon that judgment, was brought into court and used in evidence on the trial of this cause in the common pleas, but he has since been unable to find it.

An entry of the execution docket of the court of common pleas was then read of the issue of an execution in a case of Harris *v.* J. Carlisle, on a judgment for the same amount and of the same date with that in the record from the Supreme Court; an entry, also, of the return on the execution of land sold to W. H. Douglass, made in 1825.

Tarleton testified that he was sheriff in 1825, etc., and had the execution described in the entry in his hands; that he levied *it [410 on the land in dispute, had it appraised and advertised, sold it to W. H. Douglass, and returned it, with his proceedings thereon, to the court.

3. An order of the court of common pleas, made at the March term, 1828, reciting the writ and the sale, confirming the sale as having been made in all things in conformity with the law, and ordering the sheriff to make a deed to the purchaser.

4. A deed from Tarleton, sheriff, to W. H. Douglass, dated March

13, 1828, which recites a judgment in the Supreme Court on appeal, the mandate to the common pleas, and order of execution thereon also the execution, levy, and sale.

5. Deed, W. H. Douglass to Wallace, dated November 14, 1831.

6. Deed, Wallace to the lessor of the plaintiff, December 5, 1831.

7. Deed, Massie to Rogers for the same land, defectively executed.

8. Deed, Rogers to Andrew and John Carlisle.

9. The record of a chancery suit by the Heirs of Andrew Carlisle *v.* Harris, J. Carlisle, and W. H. Douglass, setting forth the recovery of the judgment in the Supreme Court by Harris *v.* J. Carlisle, that it was certified to the court of common pleas, with a mandate to carry the same into execution, the issue of an execution under the mandate, the levy on the land in dispute, and a threat to sell it. The bill alleged the judgment was fraudulent, that Andrew Carlisle paid the purchase money of the land deeded to him and John, from which a trust resulted to the complainants as Andrew's heirs for the undivided part of the land conveyed to J. Carlisle, and injunction to stay the sale on the execution. The bill describes the complainant's title as derived from Rogers to their ancestor and John, and by Rogers from Massie, and that John Carlisle had conveyed the moiety held by him to them. The bill was dismissed.

The defendant offered in evidence:

1. The will of Andrew Carlisle devising his interest in the land to A. and W. Carlisle.

2. A deed, John Carlisle to A. W. Carlisle, under whom the defendant claimed to hold.

3. He offered a deed of confirmation from Wallace, trustee of Massie's heirs, to A. and W. Carlisle, dated December 6, 1823, which 411] recites that the former conveyance by Massie to *Rogers, to have been issued by Massie without patent from the government for the land, and the after deed from Rogers to A. and J. Carlisle, the issue of a patent to Massie's heirs, granting the land to the devisees of Andrew.

This deed was objected to by the plaintiff and ruled out, on the ground that the title obtained by Massie's heirs by the patent to them inured to Rogers, the grantee of their ancestor; as both parties made title through Rogers, he was the common source of

title, and they could not dispute his title; therefore, the evidence was useless, its only effect being to falsify the title.

The judge, in giving the cause to the jury, recapitulated this title in evidence, and observed that the defendants and plaintiffs both claimed under the deed from Rogers to Andrew and John Carlisle; and, therefore, it was incompetent for them to dispute Rogers' title. For all the purposes of this trial, that title may be taken as good.

He said two objections were taken by the defendant to the plaintiff's title.

1. The want of authority in the common pleas to issue the execution on a judgment in the Supreme Court, as no mandate from the Supreme Court had been given in evidence.

2. That there was no sufficient evidence of a levy.

As to the first objection, the want of a mandate, the law required one to issue, 3 Chase's Ohio L. 970, and if none was issued, the execution from the court of common pleas was void, and a sale under it could convey no title to the purchaser. But the law did not, as supposed, require the mandate or writ of *procedendo* to form a part of the record in the cause. It merely required of the Supreme Court to send a mandate to the court of common pleas, to execute its judgments in cases brought up by appeal or on writ of error, and authorizing the court of common pleas to execute judgments as their own. Record evidence of this fact is not, as the defendants urge, absolutely necessary. The mandate and *procedendo* are process of execution; such process is seldom recorded. The evidence you have, is pertinent to the issue. If the title of the plaintiff or defendant shall depend upon a number of distinct facts, and no proof has been given of some one fact, so connected with others proven, that they could not in reason exist without such fact, the jury may presume the fact to exist. What, then, is the evidence to show you that the Supreme Court sent a transcript of their judgment to the court of common pleas for execution? *The judgment of the Supreme Court is proven [412 —the law requires the court to send such judgment to the court of common pleas for execution. An execution did issue from the court of common pleas in a suit between the same parties, for the like sum—that execution was returned, and came under the inspection of the common pleas; and you have their entry that the proceedings upon it were found in all things conformable to

law, confirming them, and ordering a deed. The sheriff made a deed, reciting the fact of the judgment in the Supreme Court, and the mandate; and, finally, you have the same judgment, mandate and execution, affirmed and sworn to in the bill in chancery, filed by the defendants' landlord to stay the proceedings on the execution. If this evidence satisfy you, the judgment was sent by the Supreme Court to the court of common pleas by mandate for execution, you may find that fact, though the mandate itself is not produced, and in the absence of a record of its order or receipt.

Another objection is taken by the defendants' counsel; it is, that there is no evidence of a levy on this land by the sheriff. A levy is essential to a valid sale. What is the evidence on that point? That an execution issued, and this land was sold on it, the sale was returned, examined by the court, found to conform to the law in all things, was confirmed, a deed ordered and made, reciting the fact of a levy in June, 1825. The execution itself, the return on which would afford you evidence of the levy, is lost. But you have the evidence of the sheriff that he had the execution, and levied it on the land and sold according to law, and the defendants' landlord in their bill swear there was a levy; but it is said the entry in the order of the court of common pleas confirming the sale, uses the term *writ* and not *execution*, or *fi. fa.*, etc. Land can only be taken upon a *fieri facias* to satisfy a judgment—no other writ can confer upon the officer the power to take and sell land. The entry on the docket is, that execution issued. The sheriff testifies that he had one, and that it was in court on the former trial. You will weigh all this evidence, and give it its common effect, and if, upon the whole, you think it more probable, that the writ, on which this land was sold, was an execution than any other writ; if it render it more probable that there was a levy on the land before it was appraised, advertised, and sold, than that it was disposed of without, you can so find.

413] *If you find the judgment in the Supreme Court, the mandate to the common pleas, the execution, levy, and conveyance by the sheriff, the plaintiff is entitled to your verdict.

The jury found for the plaintiff.

The defendant now moves for a new trial:

1. Because the verdict is against law and the evidence in the cause.

2. Because the court erred in permitting the jury to presume a mandate from the court of common pleas and a levy.

3. That the court gave to the jury an erroneous opinion of the conclusive character of the proceedings in chancery upon the complainants and those claiming under them.

The defendants' counsel have placed on file, since the trial, the following papers, to which they invite the attention of the court:

1. An order of the Supreme Court at December term, 1822, in these words: "Ordered, that all cases removed into this court from the court of common pleas, in which this court have during the present term entered judgment or pronounced decree, be certified to the court of common pleas, with a special mandate to convey the same into execution."

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3. A summary transcript under the seal of the Supreme Court, and the attestation of their clerk, of a judgment in that court corresponding in the names, date, and sum, with that described in the sheriff's deed, with this order annexed, "and the court of common pleas for said county are hereby directed to carry said judgment into effect."

DOUGLAS, for a new trial:

The statute of 1816, 18 Ohio L. 411, is as follows: "And the Supreme Court shall not issue execution in causes that are removed before them by writs of error, on which they pronounce a judgment or pass a sentence or decree as aforesaid, or on appeals, but shall send a special mandate to the court of common pleas to award execution thereupon, and such court is hereby authorized and required to proceed in such cases in *the same manner as if [414 such judgment or decree had been rendered therein." What then ought this special mandate to be, on which execution is to be awarded? Why it ought, at least, to give in a summary way the amount of the judgment, with an order (or in the language of the statute, special mandate) of the Supreme Court to the common pleas, to award execution thereon. This ought to be entered upon the journal of the common pleas, and followed by the order of the

common pleas awarding execution thereon. Without this there is no judgment in or award of execution from the common pleas, and any proceeding without it is an execution without a judgment, and a party making title under it must give it in evidence, or it will be held the same as if it did not exist. Now, can all this matter be the legitimate subject of presumption? In a transaction of yesterday, with all the evidence, if it exists, at the party's hand, can it be presumed for him. Suppose the party had withheld his judgment, could the existence of the execution, sale, and deed of so recent a date, be facts from which a judgment might be presumed? The judgment of the Supreme Court is no evidence, for the execution is not from that court, it is from the common pleas.

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see no error in saying to the jury, under all the circumstances, that they might, if they believed that the mandate issued and the levy was made, presume those facts without record evidence.

We have now laid before us the mandate itself, which shows that fact to have been rightly presumed by the jury. We have also copies of the order of the Supreme Court, of December term, 1822, for mandates, and of the entry by the common pleas authorizing the clerk to issue execution in cases sent down from the Supreme Court.

The general order of the Supreme Court is convenient in practice. It would be correct for the clerk, in making up the complete record, to attach to each case from this general entry a particular order to remand to the court of common pleas for execution. That was omitted in the case before us, but does that vitiate the judgment and mandate? No one will pretend it. The inquiry is, was a mandate issued? If the response to that be affirmative, the law in that respect has been complied with.

It is objected that the transcript, if received, is without a mandate, the law requiring an order to "award execution," and this mandate is "to carry said judgment into effect." We do not see how the judgment could be carried into effect without execution, as that was the only writ to coerce satisfaction of it.

It is further urged that the order of the court of common pleas is of no avail, because of its generality; that it can not be construed into an award of execution on this judgment. We agree that it would be better practice for the clerk of the common pleas to make a special entry in each case, stating briefly the title of the case, date, and amount of the judgment and mandate, and subjoin an order to issue execution thereon. Such an entry would evidence more care and clerklike precision. But the way this was done is the way of doing those things in that court; and are we now to declare all process so issued void? Certainly not. Courts award execution upon judgments in legal contemplation, when 417] their clerk, who keeps their seal, *affixes it to the process, and issues it on the application of a suitor. When so issued, it is the process of the court or the law, not that of the clerk. It is not usual in making title under execution to seek for an order of the court awarding the writ. The fact of the writ being issued presupposes the order, and renders it useless to produce other proof of its being awarded.

These remarks are made in reference to the orders of the courts and the mandate now exhibited, because they have been discussed. They show that a new trial ought not to be granted for the alleged error of the court, if it existed, because it can do no good. The facts accord with the presumption of the court and jury, and can be proved, if another trial were allowed.

There remains the objection to the charge as it respected the proceedings in chancery. The objection is understood to be that the court thought it incompetent for the defendant to contest the title of Rogers, the source of title common to both. This looks rather more to the rejection of Wallace's deed than any opinion of the court upon the chancery record. The record was properly admitted, as showing the declaration of the defendants as to the mandate, execution, and levy; and we see no error in the opinion of the court, or in the fact of admitting the evidence.

New trial refused.

CHARLES L. CAMP *v.* JANES, HULET, AND MARVIN.

Collateral undertaking by one, to which another adds, "I make myself jointly responsible," is not a joint contract.

THIS cause was adjourned from Medina county. The plaintiff declared as upon a joint promissory note against all the defendants. On the trial he produced a note in these words:

"Value received, I promise to pay C. L. Camp, or order, four hundred and seventeen dollars and seventeen cents, one-half in three months, and one-half in six months, with interest from date.

"G. C. MARVIN.

"CLEVELAND, *December* 3, 1832."

This paper was indorsed: L. M. Janes, W. Hulet. The plaintiff also produced a paper in these words:

"YORK, *December* 1, 1832. [418

"DEAR SIR: Permit me to introduce the bearer, Mr. Marvin, a young gentleman lately embarked in the mercantile business, and wishes to replenish his stock of goods to the amount of two hun-

dred and fifty or three hundred dollars, if he can procure them on reasonable terms. If you agree I have no hesitation in saying I will be responsible for the amount.

"Yours, very respectfully,

"WESLEY HULET.

"*To C. L. Camp, Esq., Cleveland.*"

On the same paper was written as follows:

"I fully concur with Mr. Hulet in the above recommendation, and make myself hereby jointly responsible with him.

"L. M. JAMES."

By the COURT:

There is no pretense of a joint contract as far as Hulet is concerned. His undertaking is original, distinct, and separate, having no reference to a connection with the undertaking of James. A joint action can not be sustained.

WEAVER AND CROCKET, ADM'RS OF PITCHER *v.* REESE.

Where letters of administration are revoked, and an administrator *de bonis non* appointed, *scire facias* can not be sued in the name of the removed administrator, to revive a judgment rendered in his favor while in office.

In *scire facias* to revive a judgment, it is not necessary to aver specially that no execution had been issued.

THIS case was adjourned from Fairfield county. It came up on a *scire facias*, setting forth that the plaintiffs, as administrators of Pitcher, recovered judgment against one George Hanison and David Reese, which yet remains unsatisfied without execution, and praying execution thereof against Reese as survivor.

The fourth plea is, that the judgment was recovered by the plaintiffs in their capacity of administrators, and after the judgment their letters of administration were duly revoked, and they compelled to settle their administration account; an administrator *de bonis non* was appointed, and thenceforth the plaintiffs ceased to have any control over the assets of the intestate, but the same were in the administrator *de bonis non* when the writ of *sci. fa.* was issued.

*To this plea the plaintiffs demur specially, and set forth [419 the following causes of demurrer, that is to say:

1. That there is no averment in the plea that the plaintiffs did not charge themselves with said judgment, as assets, in the settlement of their accounts.

2. That it is not averred in the plea that the judgment was assets of the estate of the intestate.

3. That it is not averred in the plea that the plaintiffs were administrators.

HUNTER, for the plaintiffs, contended:

1. That an administrator *de bonis non* can in no case have a *scire facias* at common law, to revive or execute a judgment recovered by a former administrator; and as no statute in this state gives such a writ, he can not have one here. He cited 1 S. & R. 594; 1 Salk. 306, 323; 4 Mass. 611; Cro. C. 167; 2 Ld. Raym. 1049; 2 Saund. 72, *o.*

2. Although it is alleged that the judgment was recovered by the plaintiffs as administrators, yet it does not *ex necessitate* affirm that their demand was not in the individual plaintiffs, but in the administrators as such; the description as administrators may be rejected as surplusage. He cited Ld. Raym. 436, 1215; 1 Salk. 207; 6 Mod. 92; 2 Str. 1106; 3 Mass. 319; 2 Ohio, 159; therefore it should be averred explicitly that the cause of action was in the intestate.

3. That a *scire facias* will lie to revive a dormant judgment against a surviving defendant, one having died since the judgment recovered, though there is no express statutory provision for such a case. 2 Saund. 51, n. 4, 71, *k.*

4. That the *scire facias* will lie to revive against the survivor, without joining the heirs of the deceased defendant.

5. That it is not necessary to aver in the writ of *sci. fa.* to revive a dormant judgment, that the judgment has become dormant. Arch. Forms, 431; Wil. Forms, 231.

H. STANBERY, for the defendant, insisted:

1. That an administrator after his removal, can not have a *scire facias* to revive a judgment, recovered in his representative character. Yelv. 148, 149; 4 Mass. 612.

*2. Upon the death of one of two judgment debtors, a [420

scire facias does not lie against the survivor alone. 2 Saund. 72, *k*; Ib. 51, *o*.

Judge WRIGHT delivered the opinion of the court:

The first question raised by the defendant's counsel seems to us to decide this cause, and to render it unnecessary for us to examine any other of the points made by the parties.

Our statute, 29 Ohio L. 234, authorizes the probate court to remove administrators for cause, and provides that when an administrator is removed, and another one is appointed in his stead, the new administrator may immediately have his action against the removed administrator, and recover all assets received by him and not applied according to law, and all damages done by him to the estate while in his hands. The removal terminates the authority of the removed administrator over the assets received as well as those not received. An unsatisfied judgment is not assets received, the original debt, though merged in the judgment, remains due the estate. The right to receive the amount is in the new, not the old administrator, and he can not have a *scire facias* to aid him in executing the judgment.

The plaintiff's counsel, however, insists that this recovery may have been for a debt due the individual described as administrator, and not to the estate of his intestate. The *scire facias* recites a judgment recovered by Weaver & Crocket, administrators of the estate of Pitcher. Apparently this recovery is by the plaintiffs in their fiduciary character. The plea alleges that the judgment was recovered by the plaintiffs in their capacity as administrators. This the demurrer admits. The character of the recovery must be taken as true for all purposes connected with our present inquiry; so that the broad question is open, whether the right of an administrator to recover assets not reduced to possession, continues after the revocation of his letters. We are clearly of opinion, that his authority is put an end to by the revocation of his letters.

Objections are made to the form of the writ. It is insisted that in a *scire facias* to revive a dormant judgment, it is necessary to aver that no execution has been issued for a period of five years or more. The *scire facias* sets forth the date of the judgment, and that execution thereof remains to be made. No execution is, or 421] need be recited. An averment *that five years and one month had elapsed between the date of the judgment set out, and

the date of the writ, would seem to be superfluous. As both dates appear, the court will take notice whether it is more than five years between them, and if so, the right to revive is shown, unless the defendant shall, in showing cause by plea or otherwise, set up the fact that execution has issued within five years. I allude to this objection, because it was urged that the form in Wilcox had been followed and was bad; and that it was held bad by the profession in this part of the state. We think it good.

The plaintiffs ask leave to withdraw their demurrer, and to reply or amend. They may take leave to amend on paying all the costs since the return of the writ, or to reply on paying those arising since filing the demurrer.

J. Chaffee v. G. Garrett.

Where the consideration of a note is a lease of lands within an Indian reservation, and the lessor makes title under an Indian, plaintiff can not recover.

This cause was adjourned from Crawford county, and came before the court upon the subjoined agreed state of facts.

The note upon which the plaintiff's declaration is founded, fell due on December 18, 1830, and was given by the defendant to the plaintiff for one hundred and ninety dollars. The note was given on December 18, 1829, to secure the payment of the amount named in it, as the rent of the Upper Sandusky "Walker Place" so called, which said "Walker Place" consists of a tavern-stand and improvements at said Upper Sandusky, and as a part of the reservation commonly called the "Wyandot Reservation," situated within the extreme limits of the county of Crawford, in the State of Ohio, and the line mentioned in the treaty between the United States of the one part, and several nations of Indians, concluded at the foot of the rapids of Miami, in 1817. William Walker, deceased, was a white person, and when quite a child was taken by the Delaware Indians, and was by them given to the Wyandot nation of Indians, and they adopted him into their nation and as one of them, and he afterward married a woman (now the widow Catharine Walker), who was one of the nation, and was part white.

422] By permission of said *Wyandot nation of Indians, the said William Walker, deceased, went on to and began to make the improvements at the said Upper Sandusky, called the "Walker Place" aforesaid, and so continued to occupy and improve the said "Walker Place," until the time of his death, which was some time in the year 1823; and upon his death, Isaac Walker, one of the sons and heirs at law of the said William, deceased, and the said widow, Catharine Walker, were left in the possession and occupation of the said "Walker Place," where they continued to live with the family left by the said William, deceased, and to improve the said "Walker Place," until the time of his said Isaac's death, in May, 1829; the said Isaac leaving at the time of his death his widow, Rebecca, who, with the other members of said family continued to reside on said place until her marriage. Said Isaac at his death made his will, whereby he bequeathed one-half of said "Walker Place" to the said Catharine and her two sons, the brothers of the said Isaac, deceased, and the other half to Rebecca, the widow of the said Isaac, deceased, a white woman, who was afterward married to the said Joseph Chaffee, the plaintiff in this action, and Isaiah, the infant son of said Isaac; and after the intermarriage of the said Rebecca with the said Chaffee, the said Chaffee went into the possession of the said "Walker Place," at Upper Sandusky, and on said December 18, 1829, executed the lease of one-half of said "Walker Place" to the said defendant, and delivered the possession of said "Walker Place" to the said defendant, and as a consideration for the leasing of said premises, and to secure the rent therefor, and for no other purpose, and on no other consideration, took the note above mentioned, on which the plaintiff's declaration is predicated. Said improvements, and all of them, were made with the consent, express or implied, of the Wyandot nation of Indians. The said William Walker held the appointment of interpreter under the United States, while he so resided at Upper Sandusky, as did also his son, Isaac Walker, during his residence at the same place, after the death of his father; and said Isaac claimed to be a citizen of the United States, and exercised the privilege of voting at elections, though he also received his dividend of the annuities secured by the treaties, to be paid to the Wyandot nation of Indians, as one of the nation; said Isaac, during his residence at said "Walker Place," expended a large sum of money in improving the said place, and he was also

in the receipt of all the profits *arising from said place. [423 The condition in the lease in relation to the forty-acre field, and upon the determination of which against the said Chaffee's right to the one-half of said premises, he was to deduct forty dollars from said note, depends upon the following facts: The said Chaffee then had it in contemplation to commence a suit to determine his right, and shortly after did file a petition in the common pleas of Crawford county, for partition of said land; and upon a trial of said cause upon the merits, the court determined that the petitioner had not made out sufficient title to the said premises, and therefore dismissed the petition.

PARISH, for plaintiff:

Upon the facts agreed we ask this question: Has this widow of Isaac violated any law, either human or divine—either of God or of man? The answer is but a monosyllable, *No.* If but the day previous to her marriage to the plaintiff, a white man had by force turned her out of possession of the premises, with what pleasure would this court have instructed a jury to give vindictive damages against such wrong done in an action of trespass? But she marries the plaintiff; does not he succeed to all the rights of his wife? Could not she have leased the premises? Certainly she could, without violating any law. If she could, then it follows that her husband, the plaintiff, could also lease the lands which she obtained by her former husband. But the counsel for the defendant insists that the will of Isaac Walker was an Indian will. Was void, or if valid, must be enforced by the Indians. Yes, the

> "Poor Indian, whose untutored mind,
> Sees God in clouds, and hears him in the wind,"

has exclusive jurisdiction over this will. My law reading teaches me that this court will take notice with regard to the will of the native of Hindostan, of the Turk, or of the tribe of Black Hawk. Plaintiff had a moral and legal right to marry the widow of Isaac Walker. She had a perfect, legal right to the possession of this valuable property at the time of her marriage with plaintiff. He and wife have surrendered this possession to defendant; the defendant has enjoyed the premises. The defendant is now estopped from setting up want of title in plaintiffs. I say plaintiffs, for in

effect this suit is prosecuted for the benefit of Mrs. Chaffee as well
424] as her husband. *The act of Congress referred to by counsel for defendant, has no application to this case. The court has jurisdiction over the persons litigant, and the subject matter in dispute. This court could not refrain from exercising jurisdiction in a suit upon contract between two Indians, should they choose to resort to this court for the determination of their controversy. A Seneca Indian has recovered a valuable tract of land of a white man, in an action of ejectment in this court; Judges Burnet and Sherman presiding. In the case of Nimble Jemmy *v.* McNutt, in replevin (Lane, president judge), Sandusky county, no objections were made that plaintiff was an Indian. Admitting, then, that William Walker was a legitimate member of the Wyandot nation, that Isaac followed the condition of his father, and that the wife of Isaac followed the condition of her husband; and Chaffee succeeds to the rights of Isaac's widow by virtue of his marriage, and the defense of the defendant fails. No jurisdiction over the leased premises is claimed for this court by plaintiff. Jurisdiction over the persons and subject matter of the suit (the note) is all that is claimed.

BOALT and SWAN, for defendants:

The plaintiff has an undoubted right to recover, if not prevented by the laws and general policy of the government of the United States. The consideration of the note was a lease of premises to the defendant, situate in one of the reservations secured to the Wyandot Indians by the treaty at the foot of the rapids of the Miami, in 1817.

We rely upon the act to regulate trade and intercourse with the Indian tribes, etc., approved March 3, 1802. 3 L. U. S. 460.

Section 2 forbids any citizen of the United States, or residents therein, from crossing over the boundary line to hunt; from driving stock, etc., to range on any land secured by treaty, and subjects the offender to fine or imprisonment.

Section 5 provides, that if any citizen or other person shall make a settlement on lands, etc., secured to any Indian tribe, or shall survey or attempt to survey such lands, or designate boundaries by marking trees, etc., he shall forfeit not exceeding a thousand dollars, and be imprisoned not exceeding twelve months.

By section 7, no person is permitted to reside at any town as a trader without license, etc.

*Section 12 provides that no purchase, grant, lease, or [425 other conveyance of lands, or any title, or claim thereto, from any Indian, or nation, or tribe of Indians within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution, etc. This section declares it a misdemeanor in any person to negotiate for the title or purchase of any lands held by Indians, and subjects the offender to fine and imprisonment. Do the agreed facts bring the plaintiff and the case within the prohibitions of the statute?

Assuming that Isaac Walker was one of the Wyandot tribe, subject to the usages and laws of the Indians, we conclude that his last will must be carried into effect according to the laws and usages of the sovereign power, whose citizen and subject he was. Admitting he made a devise of lands, his devisees must take, not according to our laws, but those of the Indians; and, we believe, among the enumerated matters confided to our courts, and the extent of territory allotted to this court in particular, neither the constitution nor the law requires the supreme judges to hold courts in the Indian reservations, or to take jurisdiction of contracts arising between the natives residing there. We could not well do so, without a better knowledge of their code, which is said to be entirely traditionary and unwritten. With any contracts made between Indians claiming to be such within those reservations, this court can not and will not interfere. Even Georgia did not take judicial jurisdiction over the Indians there, until the legislature expressly gave it by law. The Indians enforce their own contracts and punish crimes according to their own customs. If Isaac Walker made a will, the Indians must enforce it. As a white person, he had no right at all upon Indian lands. He could not make boundaries—he could not purchase—he could not lease. The will of Isaac Walker was void—the possession by his devisee was unlawful and void—the lease by the plaintiff and the occupation under it were both unlawful and void acts. The authorities upon this subject are collected in 3 Stark. Ev. 1631, 1632; 17 Mass. 258; 1 M. & S. 593.

The lease itself being void, none of the doctrines relative to estoppels on the principles concerning landlord and tenant can help

out the plaintiff. Where a conveyance of land is void, so that no estate passes, all dependent covenants are void also. 1 Salk. 199; Wood's J. 342.

426] *We can not see a particle of ground for the plaintiff to recover.

Judge LANE delivered the opinion of the court:

The facts agreed, show clearly that the note, the amount of which the plaintiff seeks to recover, was given in consideration of the lease. The title of the lessor to the premises leased, is derived under the will of Isaac Walker, who derived a possessory title, by succession to his father, one of the Wyandot tribe of Indians, the lands lying within their reservation.

The statute of the United States, of 1802, enacts that no purchase, lease, conveyance, or title of, or to land from, an Indian, shall have any validity, unless made in a treaty with the United States. The lease, therefore, transferred no title, because the lessors possessed no title to transfer; consequently, the consideration of the note fails, and the plaintiff can not recover.

ASAHEL NOBLE *v.* SHEARER AND MARKLEY.

Indorsement of security for costs made after suit brought, no order of court requiring such indorsement appearing in the minutes of the proceedings is not a part of the record.

THIS was a *sci. fa.* to subject an indorser for costs, adjourned for decision here from Hamilton county. The declaration sets forth, that on February 27, 1826, Henry Tice, a non-resident plaintiff, caused a summons to be issued against the plaintiff in this suit, which was returned to the February term of the common pleas of Hamilton, of the same year, and that the defendant indorsed the summons for said Tice, for costs, on November 18, 1828.

The declaration avers that final judgment in that suit was afterward rendered in favor of the said Noble, the plaintiff in this, against the said Tice, plaintiff in that suit, and that the said de-

fendants, as such indorsers, have become liable to pay the said costs, which still remain due and unpaid, etc.

To this declaration the defendants have filed: 1. The plea of the general issue, *nul tiel record.* 2. A special plea in bar, that Tice was a resident of Hamilton county, when the suit was commenced, and so continued until January, 1828; that the *writ [427 was not indorsed before the delivery to the sheriff, and not until the cause had been several times continued, and from February term, 1826, to November term, 1828, whereof, etc.

To the plea of *nul tiel record* there is a replication. To the special plea, a general demurrer and joinder.

V. WORTHINGTON, for plaintiff.

STRAIT, for defendant.

Judge WOOD delivered the opinion of the court:

The first, and indeed the only question which appears necessary to be considered and settled by us, in this case, is the one presented under the first issue. Is there such a record as the plaintiff has described? Let us consider what a record is, and in what manner it is made up, and of what it consists, and there can be but little difficulty in reaching a conclusion to us, at least, satisfactory. A record is the history of the cause from its commencement, the issuing of the writ, until final judgment is rendered. Section 101 of the practice act defines what it is in these words: "That the clerk of each court shall, in vacation, make a complete record of the writ, recognizance of bail, pleadings, orders, and judgments, or decrees in each cause finally determined at the preceding term." If the clerk omit to perform this duty in making up the record, a party may avail himself of the original files and the journal entries in lieu of it, but the proceedings must all have been in obedience to the law. It is not the voluntary assumptions of a party, although entered upon the files from which the record is made, or upon the record itself, that will make such assumption matter of record, unless the law requires it to be done in the progress of the cause, and then it forms a part of the history of the cause, and is of record.

The act of 1824, to organize and regulate the practice of the judicial courts, provides, "That any person requiring a writ shall

file a precipe with the clerk, who shall make out and deliver such writ or process as is directed; and in all cases of mesne process, when the plaintiff doth not reside in or is not a householder in the county, the writ shall be indorsed by some freeholder, resident in the county, as security for costs, before the clerk shall deliver the same to the sheriff." This is the section of the statute which con-
428] trols this case. If the writ is indorsed *before it is delivered to the sheriff, in obedience to the law, that indorsement becomes matter of record. It is a part of the writ itself, made so by statute. This writ was not so indorsed. The summons, as it is averred in the declaration, was issued and returned to February term, 1826. The cause was pending until November, 1828, when the writ was indorsed by the defendants. It is not averred that Tice, the plaintiff in that suit, after commencing his action, had left the state, and that the court, in the exercise of a power which we do not feel inclined to doubt they possess, had ruled him to give security; if such were the fact, it would change materially the aspect of this case. There is no such averment, and that the indorsement was made in obedience to that order. But after the writ had been sued and returned almost two years, the defendants came voluntarily into court and indorsed the writ. We do not say that such an indorsement is not a contract, which would obligate the indorsers to pay the costs—that question is not before us; but it does appear to us to be a voluntary contract, authorized by no law, and can, therefore, form no part of the record. A *sci. fa.*, then, is not the remedy, if the plaintiff have one to recover in this case. Our opinion is, there is no such record as the plaintiff has described in his declaration, and that judgment should be entered for the defendants.

It is unnecessary to notice the issue in law. This opinion, on this point, would overrule the demurrer, if it were necessary to notice it specially.

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J. WALLACE v. RICHARD SCOLES.

Appeal bond valid, though an attorney in the cause is one of the securities. Such an attorney punishable for violating the rule of court.

THIS case was adjourned from the county of Knox. It was a motion to set aside an order, made in the Supreme Court, quashing the appeal in the cause from the court of common pleas, on the ground that one of the attorneys in the case was one of the securities in the appeal bond.

*CURTIS, for the motion. [429

BROWN, GODDARD, and CONVERSE, against it.

By the COURT:

We believe it was error to quash the appeal, though the attorney joined in the bond, in violation of the rule of court of 1831. This conduct on the part of the attorney was a contempt of the court, for which he might be punished. But the bond must be held valid for the benefit of the appellee, otherwise the attorney may escape a legal responsibility voluntarily undertaken, and thus obtain advantage by his own wrongful act. The order to quash is set aside, and the appeal reinstated.

J. O. CRAM AND OTHERS v. JOHN AND SARAH GREEN, ADM'RS, ETC.

Executors and administrators may be compelled to account and distribution in equity.

THIS cause was adjourned from the county of Washington. The bill states that Jonathan Cram died intestate, leaving considerable estate, and that letters of administration were taken by his widow, the defendant, Sarah Green, who subsequently intermarried with the other defendant. That the complainants are the next of kin of the decedent; that the defendants have neglected

and refused to settle their administration accounts, or to make distribution of the estate. The prayer of the bill is to obtain settlement and distribution.

The defendants demur.

VINTON, in support of the demurrer.

GODDARD, for complainant.

Judge LANE delivered the opinion of the court:

We consider it a well-settled course of chancery, at the instance of creditors, legatees, and the rest of kin, to compel an account and distribution of decedent's estates against executors and administrators. The position they occupy is not in their own right, 430] but fiduciary; any one whose interests they hold, may *enforce them, through chancery, to perform their duty in the execution of the trust.

The argument for the demurrants is this: Our statute limits the jurisdiction of chancery to cases where no plain and adequate remedy can be had at law. Such remedy is provided for by law in cases like the present; and, therefore, if the jurisdiction subsisted before this provision, it takes it away.

I do not stop to inquire if such remedy is, in fact, provided. Were it the case, we do not admit the conclusions contended for. "That the chancellor has jurisdiction in those cases where a plain, adequate, and complete remedy can not be had at law," is the apothegm by which his power is limited in every country where the distinction is known between courts of law and equity. The extent of the restriction has been long since defined. It is a technical maxim, adopted by our legislature in its technical sense, and receives the same interpretation here as elsewhere. In our practice, we do not give it the restrictive meaning insisted upon by the defendants. But sustain our powers to the same extent as other similar tribunals, where jurisdiction depends upon this principle. It is a part of the general chancery law, that where a class of cases are the objects of chancery jurisdiction, that jurisdiction is not taken away, because courts of law subsequently administer a remedy. 1 Ohio, 435.

SKINNER v. P. LEHMAN'S HEIRS AND ADM'RS AND OTHERS.

Where an intestate estate is bound, as security, for one of the distributees for a debt in judgment, and the administrator, by an arrangement with the distributees, pays the judgment out of the assets of the intestate estate, and takes an assignment of it to themselves, the assignees can not enforce the judgment lien upon land bound by the judgment, but subsequently conveyed to a stranger.

THIS was a bill in chancery adjourned from the county of Montgomery. The following are the facts in the case:

Jonathan Stutsman owned sixty-six feet of lot 156, in Dayton, and in December, 1819, conveyed a part of it to the complainant. On March 4, 1820, he mortgaged his remaining interest in the lot to John Lehman, to indemnify him for being security on several notes given by Stutsman to the Dayton *Academy. Some [431 of these notes were assigned to T. Squire, by the Dayton Academy, and in June, 1820, he took from John Lehman an assignment of Stutsman's mortgage to him, and gave him an indemnity against the notes he signed as security. In August, 1820, Squire assigned the last of the notes with the mortgage to Huffman. In October, 1825, the complainant purchased the remainder of the lot from Stutsman, and took a conveyance to himself. On the same day he entered into a written contract with Huffman, for an assignment of the mortgage held by him. The complainant afterward fulfilled this agreement, and Huffman assigned to him the mortgage August 18, 1829.

On November 2, 1821, the executor of Vanderslice recovered a judgment against Stutsman, as survivor of Peter Lehman, on their joint and several obligation, which was a lien on the lot in dispute; and in May, 1823, obtained another judgment on the same note against the administrator of Peter Lehman. The judgment against Stutsman was kept alive by execution without levy, until August 22, 1829, when an execution was levied on that part of the lot deeded by the complainant in 1825; the same mortgage to J. Lehman in 1820, which came by assignment to the complainant in 1829. The complainant at the time of the judgment against Stutsman, and when the execution was levied, was in possession of the lot.

After the death of Peter Lehman, a portion of his heirs and distributees filed a bill in chancery to effect a sale of his lands, and a distribution of his estate. Pending that bill, John Lehman, the administrator of Peter, filed his cross-bill, setting forth the recovery of the judgment against him by the executor of Vanderslice, and that Stutsman was insolvent, and praying to charge the payment of said judgment upon the proceeds of the estate before distribution. A sale was ordered, settlement made, and a final decree rendered in September, 1826, that of the proceeds of the estate, the said judgment against the administrator of P. Lehman should be first paid, and the balance be distributed among the heirs according to their several rights. The sale, payment, and distribution was had accordingly; and one share of the proceeds distributed to Brown, one of the defendants, who claimed as the assignee of Stutsman's wife, one of the heirs and distributees of P. Lehman.

432] The court, in their decree in that case, ordered that the *executor of Vanderslice should, on receiving payment of his judgment, against the administrator of Peter Lehman, assign the judgment to the heirs of the said Peter Lehman, which was done accordingly on January 31, 1827.

The heirs of Peter Lehman, and the other defendants claiming their rights under that assignment, now seek to enforce the lien of the judgment of the executor of Vanderslice against Stutsman, by a sale of that part of the lot conveyed to the complainant after the rendition of said judgment; and the object of the bill is to enjoin them from asserting the lien by sale, and to disembarrass the title of the complainant.

S. Fales, for the complainant, made the following points:

1. The property of Stutsman having been conveyed by mortgage, left only an equity of redemption in him which was not the subject of levy. 26 Ohio L. 35; 22 Ohio L 86; 2 Bac. Ab. 715; Pow. on Mort. 339, 340, 369; 1 Ves. Jr. 431; 3 Bro. 480; 3 P. Wms. 324; 2 P. Wms. 416; 2 Atk. 290; Amb. 308; 3 Atk. 192, 200, 738; 1 Vern. 410; 2 Vern. 61; 1 Blk. 145; 8 East, 467; 1 Murph. 333; 5 Hayne, 53; 3 Johns. Cas. 326; 1 Caine's Cas. in E. 57, 73; 2 Ohio, 223.

2. If the judgment of Lehman was ever a lien on the land, it has been lost by long neglect to levy. 5 Ohio, 179.

3. The complainant, as assignee of the mortgage, may hold clear of a judgment of subsequent date. Sug. Vend. 475, 479, 605–608.

4. There were two judgments in favor of Vanderslice for the same debt, and the payment of one satisfied both. This was done under the decree among the distributees of P. Lehman.

5. The complainant is not affected by the decrees amongst the heirs, because he was not party to the suit.

H. STODDARD, contra, insisted:

1. That notice to the complainant was unnecessary, because the judgment had never become dormant. 5 Ohio, 179. The lien is one originating in positive law; not arising from contract, notice is not necessary. Cruise's Dig. 250; 2 Atk. 275.

2. The complainant does not occupy the relation of mortgagee prior to the judgment; the mortgage was not assigned to him until long after the judgment; and the mortgage itself was only *one of indemnity, and inoperative, unless the mortgagee is [433 damnified, which is not shown in this case.

3. When there are several judgments for the same duty, the satisfaction of one of them by arrest of the body, is no bar to proceeding upon the other. 2 Tidd Pr. 958; Hob. 59.

4. The payment of the judgment by the security entitled them to come in the place of the creditor against the principal debtor, and the assignment of the judgment is operative and valid.

Judge WRIGHT delivered the opinion of the court:

A great many questions are raised by counsel, and amply discussed in this case; but in the view we take of it, it is only necessary for us to consider one of them.

In the proceeding in chancery for the sale, settlement, and distribution of Peter Lehman's estate, all the interests asserted by the defendants in this suit were represented by the parties, and all the interest now in contest, except the complainant's. By the decree, the judgment for the identical cause of action with that now sought to be enforced as a lien against the complainant's lot was paid. The judgment against the principal debtor, who in equity was bound to pay the money, was assigned to the heirs of Peter Lehman. The interest of those heirs was joint; the principal debtor, Stuteman, was one of them. He was a party himself,

and his interest was represented by Brown's executor, his assignee. His distributive share of the estate of his wife's ancestor was more than sufficient to pay the judgment against him. In equity and law, the instant an amount of money required to satisfy the claim his ancestor's estate had upon him, for the debt paid to Vanderslice, became his by virtue of his right to distribution, that instant it extinguished his claim for so much of his distributive share of the estate of his wife's father, and the same instant it extinguished, and, in equity at least, satisfied the judgment against him, which, under the decree was transferred to him and his coheirs, or those standing in their place. It is not within his power, by transferring his interest in the estate of his wife's ancestor, to vest Brown, his assignee, with an interest which could defeat this effect. The assignee took only the rights of his assignor, subject to the same law and the same equities. Standing in the shoes of Stutsman's wife, Brown could assert no claim that Stutsman himself could not. *The situation of the combined heirs of Lehman is precisely the same. They represent, as a body, the right of their ancestor, and they can not, by distributing Stutsman's portion of the estate of his wife's ancestor, to himself or to Brown, his assignee, acquire a right to collect the amount of it again on a judgment, thus by operation of law satisfied, and out of property which, in the meantime, has passed into the hands of strangers or purchasers for a good consideration.

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Suppose a man in debt mortgage land to secure the payment, and afterward a judgment is taken by a third person against him and his neighbor, which is suffered to remain several years without execution of the mortgaged land, though a lien upon the equity of redemption in the mortgagor. While the judgment is in this situation, the judgment debtor sells and conveys the land to the holder of the mortgage, and becomes insolvent. He then agrees with his neighbor, against whom, with him, the judgment was taken as his surety, who has money of the debtor in his hands sufficient to pay off the judgment against him, that they will pay off the judgment out of the principal (and insolvent) debtor's funds, take an assignment of the judgment to themselves jointly, and collect the amount for their joint benefit, by a sale of the same land he has sold and conveyed away. The fraud of such a transaction would be palpable, and if the law sanctioned the proceeding, it would be justly chargeable with all the consequences of

the fraud. The law does not countenance or aid fraud. Chancery will stop the party sowing such a crop from reaping the harvest. That seems to be the exact case before us. The decree for the assignment does not change the case so as to affect the complainant, for he was no party to the suit and is not bound by it. However it may bind and affect the parties, it exerts no influence on his rights.

In our opinion the judgment against Stutsman is satisfied in equity, and can not be asserted as a lien upon the lot held by the complainant. The complainant may take a decree perpetually enjoining against the enforcing the judgment upon the lot in question, to quiet his title as regards that lien, and against the heirs of Peter Lehman, who are defendants, and those representing the other heirs, not defendants, for the costs.

This view makes it unnecessary to examine the other points argued.

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*J. Young v. State of Ohio. [435

The grand jury impaneled and sworn, etc., recited in an indictment, is sufficient, without specifying the number.

Defendant escapes before judgment; entry "continued for *execution and judgment.*" These words surplusage or clerical error that may be amended.

Mistake of dates.

Motion in arrest pending. Final judgment pronounced without special disposition of the motion is not error.

Our statute of amendments does not touch criminal cases. In these, nothing can be amended, except what was amendable at common law.

This case was adjourned here for decision from Franklin county.

Swan, for plaintiff in error.

Wilcox, for the state.

Judge Wood stated the case, and delivered the opinion of the court:

At the February term of the court of common pleas of Frank-

lin county, 1831, the grand jury returned an indictment against the plaintiff in error, containing six counts, founded on the several provisions of the act of January 4, 1814, entitled "an act for the prevention of certain immoral practices."

At the May term following, the defendant below was tried and convicted; made his escape from custody, and the prosecution was continued, as expressed in the record, "said Young having escaped from the custody of the sheriff, the cause is continued for his execution and judgment."

At the October term succeeding, the defendant below, by his counsel, filed a motion in arrest of judgment, and afterward, during the same term, the sheriff having brought in the body of the defendant below, the court proceeded to pronounce the sentence of the law, by imposing a fine, and directing the defendant below to find security for his good behavior, and without making any disposition of the motion in arrest.

The plaintiff in error seeks to reverse this judgment, and has assigned for error: 1. It does not appear that fifteen grand jurors, or any number, found or returned the bill. 2. By the record, it appears that the court continued the cause, to have Young executed. 3. That the trial was had, long before there was any court or bill found; that is, the record of the trial is of the 1st of Octo-
436] ber, and the bill was found in February, and *the court held in the preceding May. 4. That a motion in arrest of judgment was not disposed of by the court before sentence pronounced, etc.

We will consider each of these points, in its order. First, did fifteen grand jurors find the bill? The record states that at the February term, 1831, the "grand jury, impaneled and sworn in and for the body of the county aforesaid, presented the following bill of indictment against John Young." Is not this allegation sufficient to show the indictment was returned by fifteen grand jurors? This indictment was found by the grand jury impaneled under the act of January 9, 1823, entitled "an act relating to juries." The first section of this act prescribes the number. It can consist of neither more nor less than fifteen. A greater or less number are no grand jury. The term "grand jury" has therefore acquired a fixed, certain, legal meaning. It is fifteen such men as the law requires, impaneled and sworn as the law prescribes, to inquire in and for the body of the county, where they

are impaneled. It is admitted that the record must show that the whole fifteen presented the bill, or it is bad, for criminal proceedings are *stricti juris*. They must be certain to a certain intent in every particular, and there must be no intendment to the contrary; but when the record says, that the "grand jury" presented the bill, it is a legal grand jury, which consists of fifteen. There is, then, nothing erroneous in the record here.

Second point, that the court continued the cause to have Young executed! The record in relation to this point is, at best, a legal curiosity; but we think it can be sustained on satisfactory ground. After the verdict of the jury, the record states, that Young escaped from custody, and the cause is continued, for his '*execution and judgment!*" No one would probably hesitate to pronounce the word "*execution*" to be a clerical mistake—a *lapsus pennæ*—the substitution of one word, by inattention or carelessness, for another—execution, probably, for reception. For misprision of clerks, in clerical omissions, errors, and mistakes, the record was always amendable at common law, and it was the rule that whenever a record could be amended at common law in a civil case, it was equally amendable in a criminal case. 1 Salk. 51; and so it is, says Holt, to this day. This error, therefore, if necessary to be amended, would be permitted at any stage of the proceedings, whether before or after judgment. A mistake of the clerk in entering judgment, *that the defendant recovered, instead of [437 the plaintiff, was amended on motion, and at common law. Croke James, 631; Hutton, 41. This misprision of the clerk may be disposed of, however, on other grounds. It was not necessary for the statement in the record, that the cause was continued for any specific purpose; that it was continued is all that is necessary to be shown, and the law would infer the continuance for all legal purposes. On this hypothesis, the words for "*his execution and judgment*" may and should be rejected as surplusage. They have no business in the record, and without them the record is good.

The third point is, that the record shows the trial was had before there was any court, or bill found. Is it so? The record of the trial is of October; the bill was found in February preceeding, and the court held in the succeeding May. Counsel, we think, have mistaken the dates to which the record refers. The caption of the indictment is "*pleas held*," etc., on October 1, 1831. This record of October term, 1831, states that the indictment was re-

turned at the February term, 1831, several months before the trial. The record states the trial was had, and the verdict returned in May, 1831, continued, and judgment at the October term, and of which term the record is properly made up. I have carefully inspected all the "*saids*" and "*aforesaids*" in the indictment, and they clearly refer to the proceedings in the manner and at the times I have stated. This point is, therefore, disposed of without difficulty.

The fourth assignment is, that a motion in arrest of judgment was on file, and not disposed of, when the sentence was pronounced. Is this an error of the common pleas, which requires us to reverse this judgment? We think it is not necessarily so. If the court err, their errors must be such that an injury may result to the party who prosecutes his writ of error. If, therefore, the points made by the motion, in arrest, are not tenable, the defendant below sustained no prejudice to his rights, because the court omitted to dispose of his motion in arrest. 5 Ohio, 171; 4 Ohio, 82, 388.

The counsel do not, we apprehend, rely seriously on any point made in the motion. These objections are to all the counts in the indictment. We have carefully compared the counts with the statute, and are of the opinion they can all be sustained; and more than this, that they are well and skillfully drawn.

438] *There is no error, then, in not deciding on the motion in arrest, by which the defendant was and could be prejudiced, and that requires us to reverse this judgment.

In disposing of this case we have confined ourselves to the record, on which the errors were assigned, and the writ of error allowed. We think our inquiries should be legitimately confined to that record.

There has been much discussion in regard to amendments of the records of the common pleas court, and especially in this case; but most of which is not now necessary to be noticed, as the proceedings, as they are recited in the original record, can be sustained.

We are of the opinion that our statutes of amendment do not extend to criminal cases. Indeed, they name civil cases in express words. The court may direct a record to be made by the clerk from the minutes and files where no record exists. The court may amend the record in a criminal case, where amendments in civil cases were permitted at common law, because we have no statute reaching them, and the common law rule prevails, to wit, clerical errors, but no other. The records which are said

to be unchanged and amended, we have laid out of view. They have not been inspected, because we have not considered them the legal records in the cause.

This being a criminal case, we have taken full time for deliberation, and are of the opinion that the proceedings and judgment of the common pleas be, in all things, affirmed with costs.

WADSWORTH v. WETMORE AND OTHER COMMISSIONERS, ETC.

Neither sheriff nor county commissioners are bound to feed an insolvent debtor in jail. He must provide for himself in what manner he can.

THIS case was reserved in Portage county for decision here. The facts are these. The plaintiff was sheriff of Portage county, and one James Noble, an insolvent debtor, was committed to jail on the 16th February, and remained in jail until the 17th March following, by order of the court of common pleas. The insolvent was unable to support himself, or to furnish any means to the sheriff to support him in jail, and such support *was furnished by the plaintiff as [439 sheriff, for the aforesaid time. The plaintiff presented an account to the defendants, commissioners of said county, on the 6th June following, for such support, at twenty-five cents per day, and demanded payment. The commissioners refused to pay the amount, believing it not to be a legal charge against the county. A suit was afterward amicably entered in the common pleas, tried, and an appeal taken to the Supreme Court. The whole case was reserved on the last circuit in Portage county, for decision in this court. Plea, *non assumpsit*.

NEWTON and OTIS, for plaintiff.

BIERCE, for defendants.

No arguments or briefs were presented on either side.

Judge WOOD delivered the opinion of the court:

The action in this case is assumpsit. It must, then, be based on

an express undertaking of the defendants, or the circumstances between the parties must be such that the obligations of natural justice will raise a promise. There is no proof of any assumption to satisfy the plaintiff's claim by the defendants in express terms. Do circumstances exist, then, from which it can be inferred? This must depend on the broad principle, whether the sheriff is required, by law, to support an insolvent debtor, unable to support himself while in jail. It will be conceded that the sheriff was not, by the common law, bound to furnish such support. In England, debtors in jail were to be supported by private charity, or support themselves. It was no more the duty of the sheriff, without compensation, to administer to their wants than it was the duty of other individuals to do so.

If the common law, then, does not require this support to be furnished by the sheriff in such cases, without compensation from the debtor, it remains for inquiry, whether we have any statutory provision imposing this obligation? We have been furnished with neither brief nor argument, and do not know on what ground the plaintiff's counsel specifically rely. We suppose, however, they found their claim on section 4 of the act defining the duties of sheriffs and coroners, which contains this provision, 440] "That it shall be the further duty of the sheriff *of every county to take charge of all persons committed to prison, and see that they are safely kept and supplied with necessary sustenance, agreeable to law." The two first sections of this act prescribe the duty of the sheriff in certain cases: that he shall preserve the public peace; cause all persons guilty of a breach thereof, "within his knowledge or view," to enter into recognizance with sureties, and for refusal shall commit. That when persons charged with crimes shall abscond, or remove from the county in which the crime was committed, the sheriff may apprehend a person so charged, etc. Is there any requisition in this act, which can, by any reasonable construction, compel the sheriff to furnish support to the poor debtor without compensation from him. If there is, the liability to repay the sheriff is cast upon the county; the circumstances are clearly such, that the obligations of natural justice will raise an undertaking by the commissioners, and require them to pay the plaintiff.

Let us, then, inquire whether the obligation is imposed on the

sheriff, without compensation from the debtor, and in this is embraced the whole ground of controversy.

It is a well-settled principle that every statute shall be construed according to its subject matter. Apply this rule to the act before us, and it only has reference to such persons as are committed on an accusation of some crime or offense, and debtors are not within its meaning. There is, also, another reason for applying to it this interpretation; the words are, and the sheriff shall see "they (the persons committed) are safely kept and supplied with necessary sustenance, agreeable to law." The law provides how, and in what manner, prisoners committed for crimes and offenses shall be fed and supported by the sheriff; and, therefore, this provision is clearly referable to them in requiring the sheriff to perform that duty.

There is no statute, however, that points out either the kind or quantity of sustenance, or in what manner it shall be provided for the debtor. This section, then, can have no reference to debtors.

Suppose, however, that it includes both debtors and those charged with crimes, does it mean anything more than this: that as the debtor is confined, unable to look around him, and provide for himself from that source he would under other circumstances desire, and as from his confinement he can not even purchase his food, to provide for and prepare the sustenance *for the [441 debtor is made the duty of the sheriff, provided he furnish the sheriff with the means, but not otherwise. The legislature have made provision for the payment to the sheriff for support furnished to persons committed for violations of the criminal law. Their not having done so in the case of the debtor affords strong presumption of their intention to leave him to his own means, to private charity, or to the overseers of the poor of the township where, by the operation of law, his residence for the time being is cast; and who are authorized to afford temporary relief to transient poor, and to again seek redress where the pauper had his legal settlement. The legislature having made no provision for payment by the county for support to such debtor, is evidence that it was not believed such liability existed upon the county.

There is, however, one other provision in the statute, on which it is probable counsel may place some reliance. It is this, that the sheriff shall be allowed "for keeping and providing for a person in jail, per day twenty-five cents." In our view, this enact-

ment does not aid the plaintiff. It undoubtedly extends to both debtors and those charged with crimes or offenses; and while it limits the amount the public is to pay in the one case, it prevents the sheriff from the exercise of that inordinate extortion over the unfortunate in the other, which he might be disposed to indulge if his compensation was only limited by his avarice and not by positive legislation. No inference can be drawn, from this provision, that the county is to pay the sum allowed. It is left, in this respect, under this act, as it is in the act to which I have before alluded. The debtor, then, must furnish the means for his own support; he must subsist by charity or become a township charge. While we pronounce such to be the law, it is a cheering consideration that inability to obtain the means of sustaining life is the last evil in our community that is likely to befall even the most idle and worthless citizen for a long series of years yet to come.

Judgment for the defendant.

442] *SPURGEON v MCELWAIN.

Keeping nine-pin alleys in a town, by keeper of public house, being unlawful, builder of such alley can not recover therefor upon a general assumpsit.

THIS case was tried in Franklin county, and reserved on a motion for new trial.

It was a suit in *assumpsit* on the general counts, and tried on the general issue. It was proved at the trial, that the plaintiff performed work as a carpenter in building a nine-pin alley for the defendant, the keeper of a coffee-house. In defense, it was insisted that as the promise was laid to pay for the work done, to aid in playing a game at a place forbidden by law, the consideration was illegal, and no suit could be sustained to enforce it. The court thus instructed the jury to correct the alleged error in this, and the plaintiff makes this motion.

SWAN, for plaintiff:

Does the fact that the plaintiff knew he was contracting to build a house for a nine-pin alley, prevent him from recovering the price?

The statute, 29 Ohio L. 162, sec. 7, forbids tavern-keepers and retailers of spirituous liquors from establishing, keeping, or permitting to be kept any nine-pin alley, and also forbids such persons from having an interest therein, under a penalty of not less than twenty dollars nor more than one hundred dollars. The prohibition does not extend to the erection of the building any more than the act to prevent playing at billiards forbids the manufacture of broadcloth.

The establishment or interest in a nine-pin alley, could not incur the penalty until the thing was completed. Any preparation for the purpose, short of completion, would not subject the tavern-keeper or retailer to the fine imposed by the act. And indeed it may be said there is a *locus penitentiæ* after the establishment is complete. Should a nine-pin alley be completed, and its proprietor, instead of suffering it to be used for amusement or gaming, convert it into a ropewalk, he would not forfeit the penalty imposed by the statute. The carpenter should have the full benefit of this opportunity for repentance.

The cases relied upon by the defendant are not in point. 17 Mass. 258, and 1 M. & Lit. 593. There was a prohibition both upon the buyer and seller. The act itself was unlawful in both.

*We think the right distinction is made. 5 Taunt. 181; 1 [443 Cond. E. 67. If the contractor is to derive any benefit from the illegal act, he can not enforce a contract concerning it. The cases upon this subject are collected in 3 Stark. Ev. 1632, and none of them go so far as the defendant asks of this court.

Here a house is built upon supposition the owner may use it for unlawful or prohibited purposes. There is no contract, or obligation, or certainty, however, on his part about his so using it. Ought this supposition to deprive the carpenter of his wages? If so, the person who furnishes materials or sells the ground would be in the like predicament. If this should be the law, the courts would indirectly inflict penalties, upon those comparatively innocent, vastly more severe than the statute warrants against the principal offender. This would lead to oppression, instead of correcting the morals of the community. The rule is a good one as laid down in the case of Hodgson et al. *v.* Temple, 5 Taunt. 181. To prevent a recovery, it is necessary that the plaintiff should share the profits of the illegal transaction. If this rule should not be adopted, what shall it be? If a mechanic undertakes a house,

and is informed the owner contemplates keeping a tavern without license, is it his duty to abandon the contract, and will the law justify that course? Suppose, in the progress of the work, the proprietor suggests that one room is to be appropriated to a billiard-table and another for prostitution, may he abandon his contract with impunity? All will admit the act of finishing such rooms is, in the abstract, innocent enough; the illegality would consist in the future appropriation. The wretch who contemplates such acts may reform, and the same apartments, originally intended for most nefarious purposes, may be appropriated exclusively to the purest exercises of devotion. The crime must consist in acts, not intents, and can only be reckoned as consummated from the moment of the unlawful use to which the thing is appropriated by the proprietor.

As the intentions of the owner could not be punished, so, we suppose, the builder could not or ought not to be punished for knowing such intentions. If an upholsterer sells a bed to an unlicensed tavern-keeper, knowing it to be used for his guests, or to the keeper of a house of ill-fame, knowing it to be used for the ease and comfort of the owners, shall he not be paid for the article?

444] *If the court is to establish a rule of general application, I know of none that would answer a better purpose than that he who is to participate in the profits of an illegal transaction, as well as when both are forbidden by law to do an act, shall not have the aid of the court to enforce the contract. This rule is not too refined for the business of life, and would aid in preserving the morals of the community. Such a one as the defendant asks would lead to injustice and oppression.

WILCOX, for defendant, cited 1 Maule & Selwyn, 593; 17 Mass. 258; Rall *v.* Raguet, 4 Ohio, 400.

Judge LANE delivered the opinion of the court:

29 Ohio Stat. 162, forbids, under a penalty, any tavern-keeper or retailer from keeping, or permitting to be kept, a nine-pin alley in the building occupied for that purpose; can a carpenter, knowing the object, recover the price of erecting it?

The principle is of general application that contracts contrary to sound morals, public policy, or forbidden by law, will not be

executed by courts of justice. Although the rule is plain and definite, difficulties sometimes arise in its practical application. If an improper use be made of goods innocently sold, or if the results of honest labor be devoted to improper purposes, the agent or the vendee ought not to be visited with the penalty; yet if they intend to assist it in the illegal act, they are parties to its unlawfulness, and deserve no aid from the law.

For the purpose of drawing the line between fraud and innocency, the plaintiff proposes as a test to inquire if the plaintiff derives any benefit from the unlawful use of the goods, or appropriation of the fruits of labor. In our opinion a better rule may be found, more conformable to sound morality, and sufficiently accurate for practical application. If one intend to aid another in an illegal object, he shall not be assisted by the law: as if he sells goods packed in a particular form for the purpose of being smuggled. 1 B. & P. 551. Nor the price of drugs, for the purpose of being illegally used in beer. 1 M. & S. 593. And if knowing the purpose, and having the ability, he do not prevent it, he is deemed to intend it, as in the late case of lodgings let, Abbot held a weekly rent was not recoverable after the landlord knew they were used for prostitution. 21 Comb. 430. And a man is deemed to *intend the thing he sells or makes shall be ap- [445 propriated to its ordinary use. If that ordinary use be innocent, he is not chargeable with a subsequent misapplication. If a carpenter build a house, he is not to be presumed to do it for bad purposes; or if a blacksmith sell an ax, he is not to be held privy to a blow which may be struck without proof of design. Yet even here, if he intend to build a brothel or to assist in a burglary, he ought not to have the fruits of his labor. And if the ordinary use of the thing produced be illegal, he must be taken as intending the use, and as privy to the illegality, and therefore entitled to no benefit for his labor.

Such is the condition of this plaintiff. He assisted in constructing a nine-pin alley appurtenant to a coffee-house. It is an erection *sui generis*, whose ordinary use in such a place is unlawful. It was right for the court to charge the jury he could not recover for this work.

THE UNIVERSAL CHURCH *v.* THE TRUSTEES OF SECTION TWENTY-NINE, COLUMBIA TOWNSHIP, HAMILTON COUNTY.

Proceedings upon mandamus must be in conformity to the common law prac-

Return to a mandamus *nisi* for the distribution of proceeds of ministerial lands, that before application made, the money was all distributed, is a sufficient return.

THIS cause was adjourned from Hamilton county. At the May term of this court, in Hamilton county, an alternative mandamus was issued upon the relation of the Universal Church against the trustees of the ministerial section, No. 29, granted by Congress for religious purposes, lying in Columbia township, commanding that they pay to the relators an equal dividend of the rents and profits of said section, for distribution in January in the years 1833–34, or show cause why they refuse.

To this writ, the trustees return the following cause for refusing to pay, that is to say:

That by law every denomination of religious societies, before they can entitle themselves to participate in the dividend of the rents and profits of said section, must give themselves a name, and appoint an agent to demand and receive their portion of the dividend, who shall produce to the trustees at their annual meeting in January, a certified list of the names of the members of the society for whom he claims dividend.

446] *That by law the said trustees are required to meet annually on the first Monday in January, to make distribution of said rents and profits to such religious societies as may so apply.

That the trustees did meet according to law on the first Monday in January, in each of the years 1833–34, and there divided all the said rents among the Presbyterian, Episcopal, and Reformed Methodist and Baptist societies, they being the only societies applying for any portion of said rents.

That at neither of the times of making said dividends, nor since, have the relators ever applied to said trustees, by agent, who has exhibited evidence of his agency, and certificates of the members of the relator's society, and demanded any portion of said rents and profits.

And that no part of said rents and profits remain in the hands of said trustees for distribution.

To this return the relators plead that on the first Monday of January, 1833, they appeared by William Connel, their agent, with a certified list of forty-seven members, and on the first Monday of January, 1834, they appeared by Ira Broadwell, their agent, before the said trustees with a certified list of forty-two members, and made regular application for a portion of the dividend of the rents and profits of said section, and then produced sufficient evidence of their right to a portion of said dividend.

The defendants demur to this plea generally. There are several other pleas tendering issues in fact.

STORER and SPENCER, for the trustees, made the following points:

1. That it is incompetent for the relator to traverse or falsify the return to an alternative mandamus.

2. The plea is bad, inasmuch as it does not answer the material allegation in the return, which is, that the trustees, having distributed all the funds received, have nothing to pay to the relators.

C. FOX, contra, insisted:

1. That the court is bound to establish a practice in such cases, and that which permits a traverse of the return is the best and most convenient, and should be adopted. 3 Bl. Com. 110, 111.

2. That the return itself is insufficient, inasmuch as it is contradictory, *and sets up no new matter. 4 Bac. Ab. 518; [447 Ld. Hard. 46, 73–79; Doug. 158, 159; 2 Ohio, 108; 2 Cooper, 723, 731.

Judge WRIGHT delivered the opinion of the court:

The first inquiry claiming our attention is, whether, by the common law, it is competent for the relator to traverse and falsify the return made to an alternative *mandamus*? The object of the remedy by *mandamus* is to compel public officers and private individuals in matters relating to the public, to perform their public duties. 3 Bl. Com. 110; Bac. Ab., Mandamus. It is a writ to compel action by, not to give remedy against, the individual officer, for injury resulting from an imperfect or improper action. 3 Burr. 126, 167; 5 Bin. 103.

At the common law no pleadings are allowed beyond the return collaterally to contradict it. Taking the return as true, judgment is pronounced, awarding a peremptory mandamus or refusing it. This is given upon the legal sufficiency of the return. If false, the relator was driven to his action to falsify the return, and to

obtain redress. The statute of 9 Anne, ch. 20, changed the common law practice in England, and made provision for a course of pleading and regular trial. 4 Bac. Ab. 560; 3 Holt, 366, 367. In New York, the legislature has made provision by statute, to regulate the practice in cases upon mandamus. 1 N. Y. L. 107; 16 Johns. 62. In Virginia, Pennsylvania, New Jersey, and Massachusetts, the common law prevails as to such proceeding. 6 Mass. 464, 466; 466 Denis Ab. 323, 335; 6 Bin. 9. We have no statute in this state on the subject of the practice on this writ. The statute authorizes the courts to proceed according to the usages and principles of law. 29 Ohio L. 56. The rules and principles of the common law have been uniformly held to govern our practice, so far as they are applicable to our condition and circumstances. 1 Ohio, 245. In Turner's case, 5 Ohio, 542, this court determined that recurrence should be had to the common law, to learn the cases proper for the application of this writ. The counsel for the relators urge that the court is in duty bound to fix some rules to govern the practice on this writ, consonant with the practice in those countries where the common law rule has been found inconvenient and remedied. The court doubtless has the power to regulate its practice; but it is a power to be 448] exercised cautiously. The expediency of *exercising the power in this class of cases is questioned. In other states as well as in England, the practice has been changed by the legislature, not the courts. In this state, this very practice was before the legislature several years ago, and no change was thought necessary. We think the practice might be simplified, and justice more speedily administered than by pursuing the course of the common law; but until the general assembly shall interfere, unless the evils of the present system shall become more apparent to us, we must decline interference. The pleas, therefore, which question the truth of the return to the mandamus can not received.

The remaining question is upon the sufficiency of the return. It is, in substance, that at the annual meeting of the trustees, they distributed according to law all the funds in hand to those applying; and relators did not apply. The trustees have no fund now to distribute. It has all been distributed out. If it has been so distributed in wrong, the individual agents are not to be punished, nor redress secured to the injured in this form of action. The precise question here arising was before the court in Ohio, ex rel.

Hodge, *v.* Newton, 2 Ohio, 109, in which the court held that inasmuch as the command of the mandamus could not act on the specific fund, no order could be awarded to act on any general fund within the control of the trustees. The court say, "the proceeds of each year are specifically appropriated to each society, according to the number of its members for that year. There are different owners of the rents for each separate year; and if injustice be done in making a dividend, it can not be corrected in a subsequent one without injustice."

The return is sufficient; a peremptory mandamus is refused at the cost of the relators.

Uri Seely *v.* Robert Blair.

The Supreme Court may direct a struck jury for the trial of a cause pending before it, in a different county from that in which the order is made.

Judge Lane stated the case and delivered the opinion of the court:

A suit being pending between these parties in the Supreme Court, in the county of Geauga, a motion was made *in this [449 court, while sitting in the county of Franklin, to allow a struck jury; this motion was reserved to be decided in bank, to obtain the opinion of the whole court upon the right to exercise this power, except while sitting in the county where the suit is pending.

Although the constitution requires the Supreme Court to be holden in each county in each year, yet neither the constitution nor the law organizing this court impose any territorial limitation upon its authority, and it has been accustomed to exercise certain functions operating beyond the county in which it may be sitting. It has *ex necessitate* supplied vacancies in the office of clerk and master commissioner. It receives motions for mandamus. 5 Ohio, 249. A long course of pratice has rendered it familiar with applications to change venue with motion like the present, and an interposition for these objects is necessary to prevent delays in justice.

The papers before us present a proper case for granting the present motion.

FREDERICK WADSWORTH, SHERIFF OF PORTAGE COUNTY, v. LUTHER M. PARSONS.

Where, upon *fi. fa.*, sheriff levies upon chattels, and leaves them with the debtor, taking bond for the delivery, and the goods are not delivered, a return of the facts does not excuse the sheriff from liability to the plaintiff upon amercement for the whole debt.

On motion for amercement of sheriff, pleadings not necessary.

THIS cause was adjourned in the county of Portage, and came before the court upon the following state of facts: Parsons, the defendant in error, had a judgment against Hart et al., on which he caused an execution to be issued, and put into the plaintiff's hands, as sheriff of Portage county. The plaintiff levied the *fi. fa.* on a large quantity of ironware. The property was left in the hands of the judgment debtors, and their bonds taken for its delivery. The plaintiff then advertised the property for sale, and afterward called on the judgment debtors, according to the condition of the bond, and in the life of the *fi. fa.* to redeliver the property, which they did not do. The plaintiff then returned the execution, stating the above facts in his return. The judgment 450] creditor afterward, *at the May term of the common pleas, 1834, moved to amerce the plaintiff for neglecting to serve the execution, according to its command, founding his motion on the above facts, as returned by the plaintiff. The common pleas sustained the motion, and amerced the sheriff in the sum of two thousand nine hundred and forty-six dollars and ninety-three cents, the amount of debt, damages, and costs, and in the further sum of two hundred and ninety-four dollars and sixty-nine cents, being ten per cent. penalty thereon and costs of suit. The plaintiff seeks to reverse this judgment, and has assigned for error: 1. That the plaintiff was not liable to be amerced for any of the reasons set forth in the motion. 2. That the court of common pleas amerced the plaintiff, no plea nor answer being filed, nor any issue made up between the parties. 3. The general assignment that the order and judgment of the common pleas should have been for the plaintiff in error.

NEWTON and POWERS, for the plaintiff in error, cited 29 Stat. 103, sec. 8.

HITCHCOCK, for defendant, cited 29 Stat. 109, sec. 32.

Judge WOOD delivered the opinion of the court:

The statute, under which this motion to amerce the plaintiff was made, is section 32 of the "act regulating judgments and executions." Its language is this: "That if any sheriff, or other officer, shall refuse or neglect to execute any writ of execution to him directed, and which has come to his hands, or shall neglect or refuse to sell any goods and chattels, such sheriff or other officer shall, on motion, in open court, and two days' notice thereof, in writing, to be given such sheriff or other officer by the plaintiff or his attorney, be amerced in the amount of said debt, damages and costs, with ten per centum thereupon, to and for the use of said plaintiff." The provisions of this section are broad, "shall neglect or refuse to sell any goods and chattels." The sheriff levied on goods and chattels by virtue of the execution which was placed in his hands. He neglected to sell the property. The case, then, by the return of the plaintiff in error on the execution, is clearly embraced in the spirit and letter of the statute.

The counsel for the plaintiff in error, however, claim that the facts set up in the plaintiff's return on the *fi. fa.* "that he *took [451 a bond for the redelivery of the ironware, that he advertised it for sale, demanded it, and it was not redelivered," excuse him from liability on a motion to amerce, and leaves the creditor to his remedy by an action on the case. They cite section 8 of the above act, page 103, in these words: "That in all case where a sheriff, coroner, or other officer, shall, by virtue of an execution, levy upon any goods and chattels, which shall remain upon his hands, unsold, for want of bidders, for the want of time to advertise and sell, or any other reasonable cause, the sheriff, coroner, or other officer may, for his own security, take of the defendant a bond, with security, in such sum as he may deem sufficient, conditioned that the said property shall be delivered to the sheriff, coroner, or other officer holding an execution for the sale of the same, at the time and place appointed," etc.

If there is anything in this section which can operate to excuse the sheriff, a majority of the court are not able to perceive it. The

sheriff is in no case compelled to take a bond for the property. It is optional with him to do so or not. He may remove it or leave it. The right of possession, the temporary ownership of goods and chattels after levy, is in the sheriff. If he leaves them with the judgment debtor, or in the hands of another, and takes the security authorized by law, the sheriff, after demand and refusal to deliver the goods, according to the condition of the bond, may seize the property wherever he can find it, if he can do so without a breach of the peace. He may maintain trover for it, because he has the right to the possession. The sheriff, then, after having demanded the property, should have taken it into his possession and sold it, if it were to be found; and whether the judgment debtors, in whose possession it was left, actually redelivered it to the plaintiff or not, and if his return do not show that the property was not to be found, was not within his reach or control, the most favorable construction which may be given to section 8 will by no means excuse him. What, then, is the plaintiff's return? That he demanded the ironware at the furnace, where he had advertised it for sale, and it "was not delivered;" that it was not to be found; or that it was not perfectly within his power to take possession of and sell it, is nowhere stated, nor that its delivery was actually refused, but merely neglected.

But suppose the property was placed beyond the reach of the 452] sheriff, and this was shown by the return, is there anything *in section 8 of this act to excuse the sheriff from liability on this motion? The sheriff may take a bond for the property, or he may refuse it. It is at his own will and pleasure; but, if he can do so, for what purpose is it done? In the language of the section, "for his own security." He must, then, look to the persons to whom he intrusts the property. He leaves it at his peril. If the property is redelivered, it is well; if not, it was his folly to intrust it in such hands, and he is liable on motion to amerce.

The second error assigned is, that no plea or answer is required by the court below to the motion to amerce. Is there anything erroneous in this? In the first place, we know of no practice which requires either plea, or answer, or issue to be made up in form. We have never seen such practice adopted, and there is, in our opinion, no law that requires it; and in the second place, the plaintiff in error ought not to be permitted to take any ad-

vantage of such omission, because it was for his advantage to permit him to appear and urge anything and everything as a defense, without being confined to a single point in a plea, or answer, or issue.

Judgment affirmed.

Judge WRIGHT dissented:

The bond taken by the sheriff, he was authorized by the statute to take for his own security. 29 Ohio L. 103. Does his doing so, and the failure of the obligor to deliver at the time of sale, subject him to amercement? That appears to me the true question in this case. The proceedings on the amercement are admitted to have been regular, if the case was one for which the sheriff could be amerced. The statute authorizes an amercement of the sheriff in the following cases:

1. Of neglect or refusal to execute the writ of execution; to sell property levied upon; to pay over to the plaintiff, on demand, his debt on the amount made; or to pay over to the defendant, on demand, the surplus, if any.

2. Of mere neglect to call an inquest and return a copy of the appraisement to the clerk; or to return the writ; or to return an inventory of goods levied upon, if the whole debt is not made.

For the neglect or refusal to pay over money, the amercement is for the sum withheld, with ten per cent. penalty thereon. *In [453 all the other cases the court has no discretion in the amount, but the amercement is for the whole debt or money due, with ten per cent. penalty thereon, and costs.

The proceeding under this statute is summary and penal, and is not to be extended beyond its letter and spirit. It is intended to induce the officer to an exact performance of his duty; to prevent the interposition of his discretion between the commands of the writ and the law for the ease and favor of the debtor, and to punish in a very summary way neglect and refusal to do his duty. What duty, in the case before us, had the sheriff refused or neglected to perform for which he was amerced? To sell the iron levied upon and delivered on bond? He did not refuse to sell. Did he neglect? Neglect supposes some fault in the officer. Was there any fault in this case? The law authorized him to take bond for the delivery of the articles he had levied upon. This he did in good faith. He did not sell, because he had nothing to sell; the goods

were removed from his custody according to law, and were at the time of sale lawfully beyond his control. If replevied, or delivered up on proof of ownership in another than the defendant, they would have been removed from him no more in accordance with law; yet returning these facts could he be amerced? If proceedings are stayed by injunction from chancery, and bond given to abide the decree, the sheriff is directed to repay to the complainant all money made on the execution and not paid over. 29 Ohio L. 89. Would he be liable to amercement if he refused to pay to plaintiff afterward? That will hardly be claimed; yet he has collected money for the plaintiff, and neglected and refused to pay it over to him; and if he be not excused from amercement because the money has gone from him under the sanction and operation of law, I do not see what protects him against it. On the other hand, if it be that in either of the cases, the officer is exempt from amercement because he has neither neglected nor refused to perform his duty, but only done what by law he was authorized to do, I am unable to find the reason why the principle does not apply to the case under consideration. Suppose the sheriff had the goods at the place of sale, had offered them, and was unable to sell because of no one bidding, has he neglected to effect a sale? Is he liable to amercement? The answer is, no. He could not effect a sale according to law, and therefore is not liable to amercement, to pun-
454] ishment as a wrong-doer. It seems *to me these cases depend on analogous principles, if not upon those identically the same, and that the only sensible and just interpretation of the statute is the one which supposes the officer only liable to this highly penal proceeding for some neglect or positive breach of duty. The injustice of the construction necessary to sustain the amercement will appear probable from a single consideration. If the goods levied upon and bonded were bulky, incapable of being reduced to actual possession, though not of a tenth part the value of the debt, and though the expense of guarding them, or removing them to a place of safety, might exceed by ten-fold their entire value, yet if bonded, and not delivered at the time of sale, the sheriff would be liable to pay to the plaintiff more than ten times their value, and ten per cent. upon the whole sum. If an execution of a thousand dollars be levied on a stack of hay worth five dollars, which is bonded in case of non-delivery, the sheriff would have to pay, not the five dollars lost, but the eleven hundred dollars! And for this

he would hardly have day in court; a judgment would go against him on mere motion! It is impossible for me to conceive the legislature ever intended to provide for such a state of things against any person, and much less to subject a highly responsible public officer to such enormous penalty.

The construction I give the statute can work no injustice to any one. If the officer neglect or willfully refuse to perform his duty in cases where the sum is ascertained, he is liable to the amount and ten per cent. penalty, as punishment for his neglect or wrong act. If the amount is not ascertained because of the neglect or refusal of the officer, the whole debt is the proper measure of damage, because he whose duty it was to furnish the evidence of the less sum withholds it. If the injury to the plaintiff arise without the fault of the officer, the injured party is left to assert his rights at common law as in other cases of injury. If this remedy is resorted to, instead of the amercement, the officer can proceed on his bond at the same time, and avail himself of the indemnity the law provided for him, by judgment and execution at the same time. If the plaintiff's right to amerce arises from the mere neglect to sell, the payment by the debtor or his security in the forthcoming bond of the full value of the goods bonded, would not exonerate the sheriff from amercement, although the statute under which it is taken, expressly declares that on failure to deliver the goods, the bond may be discharged by the payment of either the full *value of the goods or the amount of the debt. 29 Ohio L. 103. [455 An insolvent debtor, therefore, by bonding goods of small value, bearing a trifling proportion to the judgment against him, may refuse to deliver, pay the value of them, and throw upon the sheriff the whole balance of the debt, if the creditor choose to exact it. Surely this can not be the law.

The analogy urged by counsel to the liability of the sheriff for the body of a defendant, who has given him appearance-bail, is not established. The appearance-bail bond is for the security of the sheriff and the party. The party may take an assignment if he will; if he do not take it and rule the sheriff to bring in the body, he is, it is true, liable to amercement, if he do not answer the rule; but the law provides abundantly for his security and protection. He may enter special bail himself, take out a bail piece, arrest and surrender the party in discharge of his liability. If he do not retake him, the cause, after special bail is entered, progresses

regularly to judgment and execution, and as special bail, he is only liable after execution against the body of the defendant returned not found and after the appearance term of process served upon him upon the recognizance of special bail. Until then, he has time either to collect the money by suit upon the appearance bail bond, or to take the defendant and surrender him in discharge of his liability. He is thus afforded opportunity to avail himself of the indemnity provided by the law which required him to let his prisoner go on bail. It appears to me what there is of analogy in the two cases is in favor of my construction of the statute, that in such cases the officer is not liable to the extraordinary and summary proceeding by amercement, but is left to his liability at common law, by suit.

I am of opinion the court of common pleas erred in awarding the amercement against the sheriff, and that their judgment ought to be reversed.

In Ring & Rice v. Foster, *ante*, 279, and in Austin v. Hayden, *ante*, 388, Judge Wright dissented. His dissenting opinion, in each of these cases, was overlooked when they were put to press. They will be found at the end of the volume.

456] *WEBB AND VANLEAR v. THE PROTECTION INSURANCE COMPANY.

Where evidence is given to the jury, the court will not set aside the verdict, unless it is palpably against the evidence, or its weight.

A proposition, by the insured, to abandon for a total loss, which is abandoned upon the agreement of the insurer to pay his proportion of the expense of repair, is not an agreement to defray the whole expense of repair, nor such an interference with the wreck to prevent an abandonment, as will subject the insurer to pay any greater loss than would otherwise be legally adjusted upon the policy.

A policy of insurance upon the hull of a steamboat, on time, does not cover expenses for the ordinary wages of the crew, while navigating the boat, into port for repair, after her founder.

Insurer is not liable for wages of the crew between the place of founder and discharge, on the direct line of the voyage.

Commission paid a commission merchant for advancing repairs, in a home port, are not chargeable against the insurer; and if the advance be at the port where the policy was executed, it is *prima facie* the home of the boat. Interest upon the amount of the loss may be assessed, after the expiration of the stipulated sixty days, from the proof of notice.

Such a policy does not cover wages paid to hands that were of the crew, who were discharged at the port for repair, and re-employed as common work hands in the repair, except for the wages of ordinary hands.

THIS case was adjourned from Hamilton county, on a motion for a new trial made by the defendants. It was an action of assumpsit on a policy of insurance, in which the defendants took a risk of five thousand dollars upon the hull, engine, tackle, and furniture of the steamboat Galena, valued at seven thousand dollars, against unavoidable, external violence in navigating the western waters, for six months.

On trial to the jury, it appeared that in a voyage from Louisville, in Kentucky, to Florence, in Alabama, the boat struck a rock near the head of Colbert's Island, in the Tennessee river, that had been dropped in the channel by those employed to clear out the river, and was seriously injured by the collision. It was conceded that the damage was within the perils insured against, and that the defendants are answerable for five-sevenths of the proper charge for repairing the injury.

The jury returned a special verdict finding the execution of the policy, and also:

1. That the injury was sustained on the 4th, and notified to the defendants on December 20, 1831, and the repairs completed on April 9, 1832.

2. That the plaintiffs proposed to abandon the boat for a total loss after the injury, but were prevented from doing so, by the defendants agreeing to pay their proportion of the costs of repairs.

*3. That the amount paid for repairs, including [457
the bill of Robinson (exhibited), was.....$2,362 23

4. That the crew were employed after the accident in preserving the boat, and taking her to New Albany for repair; were there discharged as a crew, and some of them again employed at the request of the boat carpenter to expedite the repairs; and that there was paid for their wages, between the time of the injury and the discharge at New Albany..... 1,085 61

And for like wages between such discharge and the completion of the repairs	$517 61
5. That the plaintiffs expended for provisions for the boat's crew, between the time of the injury and the completion of the repairs	984 01
6. And paid Forsythe & Co., of Louisville, commissions for advancing the above payments	206 80
Making a total sum of	$5,156 26

And the jury assess the plaintiff's damages to so much of the said items set forth in the accounts exhibited as the court shall be of opinion they are, in law, entitled to, with such interest as the law allows.

The defendants move for a new trial because the verdict is against evidence in the following particulars:

1. In finding the whole of Robinson's bill of one thousand four hundred and fifty dollars as expense of repairs.

2. In finding that the crew were discharged.

3. In finding that five hundred and seventeen dollars and sixty-one cents was expended for wages of the crew after their discharge.

4. In finding the expense of repairs with the consent of the defendants.

5. In finding that the plaintiffs were prevented from abandoning by the defendant's agreement to pay their proportion of the costs of repair.

There is also a motion by the plaintiffs for judgment for the whole items found by the jury.

C. Fox, for the plaintiffs:

On this verdict several questions present themselves for consideration of the court. They may be classed under the following heads:

458] *1. Where the state of injury is such as to justify an abandonment, but an actual abandonment is not made in consequence of an agreement on the part of the underwriter to pay for the repairs, what are the rights of the insured?

2. Is the insured entitled to recover the amount of wages paid to the crew, and money expended for provisions used, in navigating the vessel from the port of distress to the nighest port for repair, when that port is sought and the repairs made by agreement with the underwriter?

3. After arriving at the port where the repairs are to be made, the crew are discharged, as a crew, and a part of them engaged as hands, is the insured entitled to recover the amount paid the hands thus re-engaged?

In answer to the first inquiry, I take it to be a well-settled rule, "that if, by any interference of the underwriter, the insured be prevented from abandoning, the underwriters are liable for all the loss sustained by the insured, to the extent of the sum insured." 2 Condy's Marshall, 598; 2 Term, 407.

The authorities show, conclusively, that where the insured has a right to abandon, and the underwriters agree to pay for repairs, and by such an agreement prevent an abandonment being made, they must pay the whole expense of the repairs, even if it exceed the amount insured. 2 Wash. C. C. 349; 3 Mason, 51, 437; 2 Term, 407.

If the voyage was broken up and lost, that circumstance authorized the insured to abandon. 3 Mason, 51, 437.

In answer to the second inquiry, we say: If the abandonment had been made, the charge of taking care of the boat would have been with the underwriter—the expense of taking her to the port of repair would have been the underwriter's—the crew's wages and provisions must have been paid by the underwriter. Phillips on Ins. 462.

The agreement on the part of defendant's agents, that the plaintiffs should go on and repair, is an authority to use all the necessary means of making the repairs. The repairs could not have been made at a port nearer than New Albany, where she was repaired; the authority, therefore, to repair at that place imposes an obligation to pay the expense of getting her there.

I admit that if the vessel was injured, but still was able to proceed on her voyage, and was only detained to repair, according to the English rule, the wages of the crew, while so detained, could be no charge on the underwriter of the ship; *but the rea- [459
son of that rule has no application to the present case. In the case alluded to, the wages of the crew depend upon the successful termination of the voyage. The owner is at no additional expense, except as to provisions, and the freight is said to include the wages. But when the voyage is broken up, there is no chance of earning freight, and all the expense of going to another port is an extra charge.

But where the ship is hired by the month, the expense of wages

and provisions during a detention are considered a charge on the underwriter. 2 Condy, 727; Park on Ins. 126,

It is a part of the history of this country, well known to every one acquainted with the navigation of the western waters, that the captain and crew, and indeed all persons employed on board a steamboat, are uniformly engaged by the month. The crew claim and exercise the right of leaving the boat, and the master claims and exercises the right of discharging any or all of the crew at any time. The wages are paid at the monthly rate agreed upon, but the amount paid is regulated by the length of the service.

Whether the voyage is performed or not, is immaterial to the crews employed on steamboats—their wages must be paid at all events.

But whenever a ship is forced by a storm to enter a port to repair, "the wages and victuals of the crew are brought into an average, from the day it was resolved to seek a port to refit the vessel to the day of her departure from it, with all the charges of unloading, reloading, anchorage, pilotage, and every expense incurred by this necessity." Park, 126.

In answer to the third inquiry, we contend that the owners have the right to recover the amount paid to those of the crew who worked at the repairs. It is found, by the verdict, that the crew were discharged, as a crew, at New Albany, and that those of them who were employed at the repairs were so employed "at the request of the ship-carpenter, to expedite the repairs and that the expense of the repairs was not increased by employing those hands."

What difference it can make to the underwriter whether a laborer is employed from this or any other boat, I can not imagine. So long as the cost of the repairs is not increased, he has no reason to complain. 2 Mason, 51; 2 Term, 407.

The right to allowance for commissions paid the merchant who
460] *made the advances, is clearly a correct charge, without deducting one-third new for old. Phillips, 371.

N. Wright, for the defendants:

It will be seen at once that the materiality of the reasons for a new trial, and the bearing of them upon the result of the case, depend upon the construction that may be given to the verdict,

and the law which may be held to arise thereupon. If the court agree with us in the construction of the verdict and the law, then, probably, all these reasons, except the first, will be unimportant; but if otherwise, it may be essential to show that the jury had no evidence on which they could find these facts as they did. The wish of the defendants is, that the case may now be finally settled; and for that purpose that the items of the account sustained by a finding against evidence (if any such there be) should be rejected, and the amount recoverable should be now made up, upon the full and true merits of the case.

In arguing the case, I shall first consider the verdict, referring incidentally to matters arising on the motion for a new trial; and then consider any matters relating to the motion not previously referred to.

In relation to the special verdict, the items for the wages and provisions for the crew can not be recovered. It is hardly necessary to reiterate the law upon this point; this court, if I mistake not, has already fully settled it. There was in truth nothing to settle, when once the proper discriminations are made in the adjudications on this matter. The present insurance is on the boat; such insurance has nothing to do with her profits, or the expense of navigating her, either before or after damage, so far as ordinary expenses are concerned. The insurer simply warrants to make good the injury to the boat, tackle, etc.; if these are damaged he shall pay the cost of repairs; but whether she shall make one trip or twenty, whether the cost of navigating her shall be one-half or five times her income, is no concern of his; these matters belong to the insurer on freights or profits; if he can say to the owners, there is your boat as good as it was before, it matters not to him what business she has done. A strange confusion of ideas seems to have arisen among some of us at the bar, on this matter, by confounding with it a different class of questions. It is a question *discussed in this country and in England, and [461 on which there is a diversity of decisions, whether, in case of a ship turning aside to repair, to avoid danger of foundering, the wages and provisions of the crew, during the detention, would be covered by a policy on the ship as general average. In New York it is held, that inasmuch as the delay is for the common safety of all concerned, for the preservation not only of property but of life; and good policy requires that the owners should have no

temptation to peril either, for the sake of avoiding expenses to themselves—that the ship ought to contribute its average of such expenses. This is, perhaps, a correct doctrine. But the courts of New York, as well as all others, hold that wages and provisions in such cases are recoverable only as general average. Dunham *v.* Com. Ins. Co., 11 Johns. 315, 347; Barker *v.* Ph. Ins. Co., 8 Johns. 245; Leavenworth *v.* Dalafield, 1 Caine, 573; Walden *v.* Leroy, 2 Caine, 263; Paine & Scribner *v.* N. Y. Ins. Co., 3 Caine, 155; Mumford *v.* C. Ins. Co. 5 Johns. 262; Dodge *v.* H. M. Ins. Co., 17 Mass. 471; McBride *v.* M. Ins. Co., 7 Johns. 432, note *a*; Phil. Ins. 252, 347, 370; Beneck & Stevens, 127, 389; Hughes Ins. 370; Sage *v.* M. Ins. Co., 1 Conn. 239, In some of these cases, as in case of capture or wreck, the employment of the crew by law terminates by the casualty to the ship, so that if they are continued afterward it is on a new engagement, and is construed as being done for the safety of all concerned, and so is included in general average. Hence the distinction between capture and embargo; the former dissolves the contract with the crew, the latter does not; and if the crew is retained, in one case, it is considered as a special employing to take care of ship and cargo, and to be ready for reshipping in case the ship is released; in the other case, as the continuance of their ordinary employment, the former being general average, the latter not. Various other distinctions, arising out of special circumstances, might be referred to, were it necessary.

Another case has occurred, which has also led to confusion of the rules of law on this point. If a ship is compelled to employ extra assistance to reach a suitable port of repair, that extra expense, in proper circumstances, is considered as part of the cost of repairs; as where a boat requires to be towed, or to employ extra hands, etc., to reach such port. This may be a proper charge, for the same reason that the cost of bringing the materials for re-
462] pair to an inconvenient place would be *part of the expense. But this has no application to the present question. The principle is this: the insurer on the ship has nothing to do with the cost of navigating; this belongs to the owners; they provide the hands to navigate her, and take care of her, both when she is in prosperity and adversity, as well when on the rocks as when under way; it is the duty of the crew at all times, as well after the accident as before, to bestow their utmost exertions in taking

care of and saving the ship; this is their ordinary duty, resulting from their employment and the wages they receive; and if this is not done, the policy is forfeited. Can it be contended that on these rivers, if a boat meets with an accident that disables her for the time, the crew may abandon her, and if they are employed afterward, it is at the cost of the insurer? And yet such is the result of the doctrine against which I contend. The moment of an accident is that in which all the efforts of the crew are required, as well as their continued exertions afterward, and what captain would ever employ a crew upon other principles? In the present case, the wages and provisions claimed are these ordinary expenses, resulting from the ordinary duty of the owners to take care of their boat.

In the present case, there is no pretense that the claim can be sustained as general average. No facts, looking that way, are found in the verdict or exist in the case. It would hardly be claimed that the cargo, which might have been in the boat at the time, was liable to contribute to these repairs.

Another ground has been suggested on which a part of the wages are claimed to be covered; that is, that the hands were employed in making the repairs. I refer now to their employment independent of the circumstance of their discharge and re-employment, as found in the verdict. I shall consider that hereafter. The fact that the crew assist in making the repairs is no reason why their wages should be allowed. In Sage *v.* M. Ins. Co., 1 Conn. 239, this matter is ably treated. It is the duty of the crew to do all in their power to prevent and repair injury. If they are not able to do it, extra aid must be employed, for which the insurer is liable. While they are retained as crew they draw their wages, whether assisting in the repairs or not; their duty is to take all possible care of their boat, and it becomes impossible to distinguish so as to decide how much of their labor is bestowed on the repairs, and how much on their other duties. He who occasions a confusion *of property, so that the interests of [463 one can not be distinguished from those of another, must bear the loss. It is utterly impossible, therefore, where the hands are retained in the employ of the ship-owners, to make any apportionment of their work on account of repairs. Probably no case ever occurred where the crew have not rendered some assistance in the repairs; and yet no case has attempted to make a partition. The

rule must be one which can be acted upon, and which will be obvious; and none can be found for this purpose but that in Sage v. M. Ins. Co.

In the present case the wages are claimed as *wages*, the account is so kept; even the cook and his wife, the steward, etc., all as the ordinary hands of the boat; the captain, too, whose general care and superintendence of the boat would be indispensable, especially at a season when the boat would start on a voyage the moment she was ready; all are allowed full wages in the name of wages, without an attempt to put them in the shape of cost of repairs. The accounts were necessarily so kept, while the hands were retained as a crew; and of course there could be no discrimination, by which an estimate could be made of the worth of that part of their services, which went into the repairs, if such a distinction could be taken in law, which surely could not. In Perry v. Ohio Ins. Co., 5 Ohio, 306, and Gazzam v. Cincinnati Ins. Co., *ante* 73, the law on the foregoing points is so fully settled that it was not necessary to have said what I have.

But the plaintiffs attempt to take this case out of the general principle by virtue of certain matters found in the verdict.

The verdict finds that "the plaintiffs offered to abandon, and were prevented from so doing by the agreement of the defendants to pay their proportion of the cost of repairs." The plaintiffs contend that this subjects us to all their account, and cite Da Costa v. Newnham, 4 D. & E. 407. This case is so much relied upon that I must drop a word upon it. A writer in 10 Amer. Jurist, 254, speaking of this case, says that the court without referring to principles and without argument, took for granted certain principles of law, referring to authorities which in fact sustain no such principles; and in consequence of such a sanction the case has been since used to sustain absurd positions. I do not quote the language. The case is evidently a singular, if not an inconsistent one, though it is difficult to tell what it decides. It relies 464] on the fact of a refusal to accept the *abandonment, and some agreement about making the repairs, but what items were brought in by virtue of this agreement does not appear. The whole expense claimed was six hundred and seventy-eight pounds; the verdict was for sixty-two pounds and nineteen shillings, to which the defendant objected. The judge says, it was a case where the party had a right to abandon. The case does not decide

expressly that wages and provisions were not recoverable, even in that case. He decides that an abatement of one-third new for old was not to be made; but this he puts solely on the ground that the ship after repair never came fully into the hands of the plaintiff. Now, if the matter about abandonment did not give a right to claim wages and provisions, the case is in our favor, and cuts off the whole claim under that finding in the verdict. Again, in the present case, there was no right to abandon; the verdict does not find a case for abandonment; the proof makes no such case; for the damages, as estimated by the witness, and the expense of repairs as proved, do not approach to half the valuation, seven thousand dollars.

The agreement, as found, is to pay our proportion of repairs, and nothing more, precisely what we are liable to do without the agreement; and how can it now be said that this is an agreement to pay, in addition, wages, provisions, etc. The finding, therefore, if relied upon, seems to me to protect us against all but repairs. If a case of abandonment had existed, and the boat had been abandoned, she would have been ours, run on our account, and when repaired, her earnings and enhanced price would have been ours. Surely it would be preposterous now, to attempt to charge us with the expenses of running to a certain date, and give us no account of subsequent profits and enhanced value.

Upon the motion for a new trial, if my construction of the verdict is not correct, there was not a particle of proof that the plaintiffs were prevented from abandoning by our offer to pay the proportion of the cost of repairs. All the proof on this point is included in the deposition of Forsythe, his letter of December 14, and E. Marsh's deposition. This letter is not even an offer to abandon, for it only offers to abandon an undivided interest, that is, five-sevenths. The principle of abandonment is, that the insured prefers to give up his interest in the boat, and take the insurance money, so that there can not be an abandonment in part. The basis of abandonment is a total loss, that is, the insured has lost all his interest; of *course he can not stipulate to retain [465 a part, when he offers to abandon.

In the next place, after this letter was received, some time in January, the defendants, as they had a right to do, took time to deliberate and inquire, and on the 25th of January an answer was given, as Forsythe states it, that defendants would make no com-

promise, the owners might go on and repair, and defendants would pay their proportion. Forsythe requested defendants to send an engineer to make the repairs; but they refused, saying the owners must make the repairs, and defendants would pay their proportion; and they might make them where they thought proper. Marsh states the matter in about the same way, showing a little more distinctly that all that passed was merely a declaration of what the law requires in case of a partial loss, that it was not the duty of the insurers to make repairs or to advance money for it; but the insured must make their own repairs and send in their bill. At the time of these negotiations the boat was lying safe at Waterloo, where she arrived December 30, as stated in Hacker's deposition, or was employed in towing keels (same deposition), not a word was said in all these negotiations about abandonment; if Forsythe's request, that defendant should send a hand to take charge of the boat, can be construed as alluding to abandonment, the reply was a direct refusal, not upon any condition, or holding out any inducement to prevent an abandonment; but a direct negative, stating that defendants would do precisely what was their legal obligation in case of a partial loss; in this the plaintiffs acquiesced, without demanding any terms or conditions, or intimating that they wished to rely on an abandonment. Most clearly these statements can not, with the least color of fairness, be construed into any sort of a special contract, founded on the consideration of relinquishing the abandonment. In the first place, no case for abandonment existed; in the second place, no valid one was offered; in the third place, no inducements to relinquish it were held out, nor any terms proposed for doing so; but it was, if suggested, promptly refused, and the only offer was to do what the law required in case of partial loss. It is clear, therefore, if there be anything in this finding materially varying the rights of parties, that there was not a particle of testimony to warrant it.

Another item of the verdict which seems to be relied upon as giving some right to claim these wages and provisions, is, 466] *"that the expense of repairs and subsequent control of the boat were by the assent of the defendants." I understand from this, precisely what the words express, that defendants did not object to the making of the repairs, and the control of the boat, by plaintiffs. This would probably bar us from objecting to the

place and time of making the repairs; but our simple assent to what the plaintiffs had a right to do surely implies no additional obligation on our part. It might as well operate to bind us to pay for lengthening the boat, as to pay the wages of the crew.

If this finding has any other meaning or effect, it is entirely unsupported by testimony. The only proof on the point is Forsythe's deposition, who says defendants' agent told them to make the repairs, and that they might do it where they thought proper, and he thinks New Albany was spoken of as the place contemplated. This was merely stating to them their legal duty, surely not the making of a special contract. There can be no difficulty upon this point.

Another fact in the verdict is also relied upon to charge us with a part of the wages, viz: "that the crew were discharged as a crew, and afterward were employed by the captain, at the special request of the ship carpenter, to enable him to expedite the repairs." This point is taken with reference to what is said in Da Costa *v.* Newnham, 4 D. E. 407, viz: that the crew having been discharged, and some of them employed by the day, by the ship carpenter, about the repairs, the wages so paid by the carpenter was a proper item of the expense of repairs. It must be kept in mind, what is the rule of law upon this point. The captain and crew, while employed as a ship's crew, are bound to take care of the ship, to assist in repairing her, and to do everything else in their power for her benefit; they are bound to spend all their time in her service, and this results simply from their relation to the ship as her crew. I will not undertake to decide, nor to inquire, whether the actual damage to a ship might be recovered by estimation, without reference to the bills for repairing; and, if so, whether, in any possible case of that kind, repairs actually made by the crew could be recovered; probably not, however, from the impossibility of reducing any such rule to safe practice. But it is enough for the present case that the wages of the crew, as a crew, can not be recovered. To admit it would be a violation of all *principle, and open the door to the grossest imposition [467 upon insurers.

The finding stated above is, that "the crew were again employed by the captain," etc. I consider, therefore, that this reemployment was as a ship's crew; for it was the captain who employed, and that not to work at the repairs, but "to enable the

carpenter to expedite the repairs." The ordinary duties of a crew about the boat would aid in expediting repairs; and the fact that they were employed by the captain, and not by the carpenter, shows that they were employed as a crew. If this be the fair construction of the finding (and that it is, is confirmed by the fact that it comes the nearest to anything which the proofs would warrant), then it leaves the matter as it stood before—the hands were still acting as a crew, owing duty to the boat in that capacity, and entitled to their wages accordingly.

But if the true construction of the finding can be made to operate against us, then, under the motion for a new trial, we insist there is not a particle of proof to warrant such a finding.

The remaining item is two hundred and six dollars eighty cents, commissions paid by plaintiffs to Forsythe & Co., for advancing them four thousand one hundred and thirty-six dollars to pay the boat bills.

This is a novel claim; the plaintiffs, not being flush of money, raise it from a commission merchant and call on us to pay the commissions. If they had borrowed it from the bank we must have paid the interest; and if they had plenty on hand we should have been saved this item, so that the amount recoverable will depend on the wealth or the credit of the insured. This is not the law. There are cases of repairs made in foreign ports where commissions are recoverable. The captain, abroad, has a power, in case of necessity, to pledge the ship, or resort to any other fair means to raise funds; and the expense of raising them in a foreign port, if inevitable, is part of the cost of repairs. But at home no such principle applies. It is so decided in Sage *v.* Marine Insurance Co., 1 Conn. 242, and so always must be.

The defendants were not bound to advance money to make the repairs unless they had accepted an abandonment or a valid one was made and adhered to. The terms of the policy, as well as all practice, settle this—the loss is not payable till sixty days after notice, and the actual cost of repairs is the criterion by which the
468] amount of partial loss is usually estimated. *It would be absurd to say that the insured has a right to call at once for money in advance to make the repairs; his course is to exhibit his bills of repairs duly authenticated, and claim payment of them. As said in Peele *v.* Marine Insurance Co., 3 Mason, 85, "the duty of the insurer is *solvere*, not *facere*, to pay the amount, not to do the work."

"If the underwriter has a right to repair in one case he has in all cases, and in his own manner, and with his own materials."

It remains to add some further remarks on the motion for a new trial. The damage to the boat was small. Even making a liberal allowance for the necessary injury by cutting the deck, it is difficult to conceive how the expense of repair could be made more than five hundred dollars. Yet the owners, while making the repairs, have seen fit to lengthen their boat twelve or thirteen feet, refloor the decks, new build parts of the engine, etc., and by thus inevitably blending the repairs with important improvements and alterations, charging us with the wages and provisions of their captain and crew throughout, and even the commissions on their own money, make out a bill of upward of five thousand dollars. The account presented is the very reverse of that simple, distinct exhibit of the costs of repairing the damage, which usage in such cases requires. It is an obvious attempt to make out of the insurer, not only an indemnity for an unprofitable trip, but even a large proportion of the cost of a new and enlarged boat; for how else could they attempt to claim of us all the wages and provisions of the crew, while themselves admit that the improvements were in progress during the same period.

The first item objected to in the verdict is including the whole of Robinson's bill of fourteen hundred and fifty dollars thirty cents in the repairs. On this we must ask the court to read De Hart's deposition. He states the repairs to the bottom, including the hauling out and launching, from four to five hundred dollars. The boat was not hauled out. If we allow them five hundred dollars for the just share of Robinson's bill, they will be fully remunerated as near as we can judge. The labor, applicable to both branches jointly, stands against us wholly; doubtless the same is true as to materials. We can not otherwise account for the great difference between the estimate for repairs and the bills rendered. The legal rule is, that wherever it can not be clearly shown that an item is applicable to repairs only, it ought to be set down to improvements; and this, among other reasons, because the plaintiffs *have chosen thus to confuse the two branches of busi- [469
ness, and it rests with them to show clearly what part belongs to us.

Another matter in which the verdict is supported by proof, is the amount paid to the crew after the supposed discharge; or, in other words, the amount paid the crew for assisting in repairs. I

have said before I do not suppose this item recoverable on the face of the verdict; but, if in that I mistake, the recovery must be on the ground that the amount was, in part, paid for repairs. On this point I wish to refer the court to the testimony, not only with reference to the point itself, but to show the manner in which the plaintiffs set up their claim, with reference to other points above referred to.

I believe all the other reasons for a new trial are sufficiently touched upon under the first branch of the case. The defendants wish that the case may be now finally adjusted; and, for that purpose, if there be anything in those facts in the verdict not warranted by the proof, which operates against us, we wish that the amount may be made up by rejecting such unauthorized finding, or, in other words, on the whole merits of the case as presented in the testimony.

On the question of interest, it can not be claimed prior to the 9th of April, when the work was completed, and money paid; for it could not have been demanded or paid before that time, the amount not being ascertained. But, further, the amount is payable sixty days after proof of loss; this proof means the ordinary preliminary proof, which includes not only the fact of injury, but the amount, in case of partial loss; so that this proof could not be complete till the 9th of April, and sixty days after that must be allowed; and so interest would begin from June 8, 1832.

C. Fox and B. Storer, in reply:

As to the item of Robinson's bill, the question was distinctly submitted to the jury. The defendant had the benefit of De Hart's deposition. We met it by the testimony of several witnesses, showing the standing of Robinson, his character as a carpenter, and by showing that De Hart was no mechanic. The matter was fairly submitted to the jury, on the question of credibility, and we suppose must rest as it is.

With regard to the mode and manner of keeping the accounts 470] of the expenditures; these matters were submitted to *the jury, and the objections which are now raised were fully discussed. So with regard to the amount paid for repairs.

There is much said about the term "wages." The counsel says, the fact of the term "wages" being made use of, shows that all the money paid the hands were for wages as a crew. The verdict

shows that the crew were discharged, yet we find that the charges for wages are continued as before. And is not this the ordinary mode of keeping accounts of expenditures? Is not the term applicable to compensation paid for all labor, whether as laborers, mechanics, or otherwise.

That an abandonment must embrace the whole subject insured is admitted; but that where five-sevenths only of a ship is insured, the owner is bound to abandon the whole vessel, is not admitted. If a ship and cargo are insured, the owner can not abandon either the ship or the cargo alone. But if the owner of one-fourth of a vessel insure his part, and the other owners do not insure, can it be seriously contended that the owner who did insure can not recover, merely because he can not give up the property not insured? All the books require is, that the insured abandon to the insurer his right to the property insured, so that he may stand in his place. Park on Ins. 143.

But it is insisted that the case is not one in which an abandonment could be made, because the injury was not half of seven thousand dollars. This point, we supposed, was conceded; for we have no recollection of the question having been discussed before the jury; indeed, the charge and verdict shows it was not, and if it had have been the intention to raise the question as to the right, it was a question of fact which was for the jury to decide. Phil. Ins. 400; 3 Cranch, 386–391. But if it is properly before the court, it is evident that it is a clear case of abandonment for several reasons:

1. The voyage was broken up and could not be pursued, and the vessel was at a place where repairs could not be made. 6 Mass. 483.

2. Because a great expense was necessary, and unless the underwriters would have agreed to pay that expense, the right to abandon did exist.

"The cases where the insured may abandon are: if the voyage be lost or not worth pursuing; if the salvage be high; if further expense be necessary; if the insurer will not, at all events, undertake to pay that expense." 2 Condy's Marshall, 580; 2 Burr. 1209; Park, 145.

*3. Because the actual expense of repairs, as we contend, [471 was more than one-half of the value.

Our claim is not for the ordinary wages of the crew. On the contrary, it is for the extraordinary wages and the extraordinary

expenditures for provisions, etc., that we claim; and so Gazzam v. Cincinnati Insurance Company is not opposed to our claim. It stands upon the same principle as any other extraordinary expenditure. The seamen are not entitled to wages in case of wreck before the voyage is terminated; yet when the voyage is broken up, when it is impossible to proceed further, they may claim pay for their extraordinary exertions by way of salvage. Phil. Ins. 463.

But this crew, in coming from the port of distress, ought to be considered as re-engaged. It is a new voyage to all intents and purposes, and has a new object in view.

But these expenses are claimed as extraordinary, because they have been incurred at the solicitation and request of the defendants, to prevent what they considered a greater evil, viz: an abandonment. The court is specially referred to Hughes on Insurance, 327, on this question. He says: "If an underwriter authorize the insured to do what they conceive to be best under the circumstances, he is bound by acts done by the latter, in the exercise of a sound discretion."

Again, suppose the plaintiffs had not seen cause to have repaired at all, and had sued as for a total loss, but on the trial were not able to prove a total loss, would they not have been entitled to a verdict for the actual injury sustained? Most assuredly they would. 2 Condy, 729; Hughes, 372; Park, 399. And the amount of that injury would have been the expense of repairing her, and this must have been determined by the opinion of men acquainted with the business. If at the port of distress there were no ship carpenters to be had, what would it cost to procure them? Would it be cheaper to take carpenters to the boat, or to make the temporary repair and navigate her to the most convenient port? These questions would suggest themselves to the mind naturally, and lead to the correct conclusion.

It is perfectly immaterial, therefore, whether this was a case where an abandonment could have been made; the question presented to the court is, what was the actual damage sustained at the place where she was injured—what would it cost to repair her there. Was it prudent or imprudent for the captain to
472] *take her to a convenient port? Was the expense increased by taking her to New Albany? If not, then defendants

are not injured, whether they were bound by their agreement or not.

The case in 1 Conn. does not militate against our position. In that case the voyage was neither ended nor broken up. The seamen were under the customary wages, and their services were no extra charge to the owner.

As to commissions, we claim them on the ground that they were paid in a foreign port. The owners live in Florence, Alabama. The funds were raised in Louisville. The ports of the different states are foreign ports to each other. If a bill of exchange is drawn in one state on a person in another state, it is a foreign bill. The states are, for all judicial purposes, foreign to each other. The allowance is claimed because it is a customary thing to transact business at a distance by an agent, and there is as much reason for it in this case as any other.

Judge WRIGHT delivered the opinion of the court:

The motion for a new trial first claims our attention. The items of Robinson's bill are by the jury placed under our supervision in settling the law of the case, and it will not be necessary to grant a new trial on that account, even if some of the items in the amount were improperly charged. But if it was not so, there was evidence given to the jury upon those items, as upon all the other matters objected to as found without evidence. The evidence submitted warranted the jury in finding as they did, as to all the general items, but that for the wages of the crew as laborers; and this court is not inclined to weigh the evidence after the jury, to see if they might not come to a different conclusion on the same premises. It is only where a verdict is palpably against the evidence, or the decided weight of it, that courts are warranted in interfering to set it aside, in order to send the cause to another trial. That is not this case. The motion for a new trial, therefore, is overruled. The claims for the wages of the crew as laboring hands we will consider hereafter.

The plaintiffs assert a claim to all the items returned by the jury, because the case made was of an injury warranting an abandonment for a total loss, and they were prevented from abandoning by the agreement of the underwriters to pay for the repairs.

The authorities show that where the underwriter, by his

interference, prevents the insured from abandoning, he is liable
473] *for all the loss sustained by the injury to the extent of his insurance. 2 Cond. Marsh. on Ins. 598; 2 Term, 407. And if the right to abandon exist, and the underwriter agree to pay for the repairs, he may be held on such agreement even beyond the amount insured. 2 W. 6; 6 R. 3, 9; 3 Mass. 51, 437; 2 Term, 407.

It is insisted that as the voyage was broken up and lost, that circumstance authorized the insured to abandon. 3 Mason 51, 437. If the right of the plaintiffs to abandon, depends upon the breaking up of the particular voyage in which the Galena was employed at the time of the injury, it can not be regarded in this case. The insurance here is on the boat upon time, and has no relation to the voyages of the boat, or the freight she carries. If the boat lay in ordinary the whole time, she is at the risk of the insurer, and it is no part of the contract that she shall make any voyage. The breaking one up, then, can confer no right on the insured.

The finding of the jury is, that the boat was not abandoned to the defendants. The plaintiffs proposed to abandon, but were prevented by the agreement of the defendants to pay their proportion of the costs of repair. This is not an interference with the boat, nor an agreement to pay all repairs, but simply an agreement to pay their proportion of the costs of repair; that is, what they were liable to pay. If the insured had a right to abandon, this agreement to pay could not have prevented them from doing so, in any way to increase the liability of the insurer. The interference seems to us simply this, if you do not abandon and proceed in the repair, we will pay our proportion of the repair. It appears evident to us that the agreement precludes the idea that they were understood to agree to pay all expenses and repairs, and that the agreement prevented the abandonment. The proposition to abandon not being persisted in, the parties were left to their legal liabilities.

We are next to consider the items of the verdict. The defendants object to the whole, and,

1. Is the whole amount of Robinson's bill chargeable upon the insurer? I have looked over the account. The charges are expressly made as for repairs of the injury to the Galena at the Colbert shoals, on the Tennessee, and sworn to as such. The items are such as would ordinarily arise in such repairs. No particular

item is objected to. The objection is directed *more against [472
the aggregate amount than the charges. The jury find the payment of this bill part of the expense of repairs.

2. As to the residue of the amount found for repairs in the general item, it is not objected to.

3. The next item is for the wages of the crew between the founder of the boat and their discharge at New Albany. The decisions we have heretofore made on this point should put this item at rest. In Perry *v.* Ohio Insurance Company, 5 Ohio, 306, and in Gazzam *v.* Cincinnati Insurance Company, *ante*, 73, this court expressly decided that the insurer was not liable on this kind of policy, for the wages and provisions of the crew, even though they were exclusively employed about the repair of the injured boat. The insured is only liable for the extraordinary expense occasioned by the injury, which does not include expenses for the mere delay of the boat, or ordinary wages for her navigation to the port of repair. These decisions, in our understanding of them, exclude from the verdict the item for the wages of the crew before their discharge at New Albany, and the item for the provisions of the crew. Besides, the boat on her way to the port of repair, earned towage of another boat, and passage money, one hundred and seventy-five dollars and fifty cents, which is credited in the account. Instead, therefore, of being an unmanageable wreck, to be driven by external power, she was earning freight.

4. The next item found by the jury and objected to, is that for commissions on the money advanced for repairs. The right to this charge will be determined by the answer to the question: was New Albany, at the foot of the falls of the Ohio, a foreign port to the insured, upon a policy on time to navigate the western waters? Such commissions for raising money have been allowed as a charge upon the underwriter, when from necessity the assured has been compelled to raise money in a foreign port. The expense of raising funds in a foreign port is inevitable, and therefore chargeable on the underwriter. But no such charge is admissible where the expenditure is at home. 1 Conn. 242. The policy in this case has express reference to the western waters as the range of the boat. She may run on them or lie still, in either event the risk attaches. The policy was executed at Louisville, the expenses were incurred there. Without other evidence we must regard that place the home of the boat. The undertaking is to pay the loss, if it exceed ten

475] per cent., sixty days after proof of loss. *What do the terms *proof of loss* mean in this policy? We think it must, of necessity, include proof of the fact of loss, and the amount of the loss if partial, or if not, that it exceeds the whole amount at risk. The underwriter has no right to do the work in his own manner, and with his own materials. His undertaking is to pay the amount, not to do the work. 3 Mass. 85. This item, therefore, is not admissible.

The only remaining item is that for the wages of the crew, while engaged in the repairs at the request of the corporation, after they were discharged as a crew. The amount found by the jury includes the wages of the captain, mate, clerk, several engineers, cook, and common hands, at a rate of compensation ranging from fifteen to one hundred and seventy-five dollars a month. The jury find that some of the hands after their discharge were employed by the captain at the request of the boat's carpenter to expedite the repairs. The captain was not, therefore, among those of the crew employed; he was the employer. His wages are to be stricken out. The proof was that common hands were to be had, at the place of repair, for from seventy-five to eighty-seven and a half cents a day, finding themselves. If the crew, including engineers at one hundred and seventy-five dollars a month, were discharged as a crew, and employed as hands in expediting the repairs, they would be entitled only to the pay of common hands. The jury find that their employment did not increase the expense of repair. In this they must have erred, or it must appear that their extraordinary wages were occasioned by extraordinary labor, of which there was no evidence. Robinson, the carpenter, says in his deposition, "the captain retained some at my request, for the purpose of aiding me." Webb, the captain, says, "the hands who remained with the boat whilst the repairs were progressing, were such hands as I was pleased with, and I kept them that did remain in that service with a view of having them altogether, that I might command their services when the boat should be repaired." The account rendered is for payments, as we have seen for the different officers and men of the boat, at the wages pertaining to their different stations and grade of employment. As hands engaged merely in the repair, they were only entitled to the wages of such hands. Webb's deposition would seem to make it pretty clear that some other consideration entered into their discharge and new employment, beyond the mere labor on the repairs; they

were, in part at least, employed that they might be at command, ready for service, when the repairs were completed. *This [476 evidence and the manner of keeping the accounts render this whole item suspicious. We have doubted if it should not be altogether rejected, the confusion in the accounts arising from plaintiff's manner of keeping them; but upon the whole, conclude that so much should be allowed, as the work of all the crew, except the captain, amounts to, at the wages of common hands, say seventy-five cents a day. At this rate the days charged three hundred and thirty exclusive of Sundays, would make the sum of two hundred and forty-seven dollars and fifty cents.

Arranging the verdict upon these principles, it will stand as follows:

For the expense of repairs	$2,362 23
Additional for the crew employed as hands three hundred and thirty days, exclusive of Sundays, at seventy-five cents per day	247 50
Total	2,609 73
Deduct proceeds of two lighters sold,	25 00
Whole loss	$2,584 73
Five-eighths of which is	1,846 23
Deduct one-third new for old,	615 41
And the amount of loss is	$1,231 82
Add interest from sixty days after repairs completed, say from June 8, 1832, to May 2, 1834, nineteen months and twenty-four days,	145 64
Sum for which the verdict is to be entered	$1,377 46

The plaintiffs may take judgment for that amount, or if they refuse, a new trial will be awarded. Judgment for the plaintiffs. 2 Caine, 79.

LESSEE OF STUART AND OTHERS *v.* O. PARISH.

Land sold for taxes before patent issues, the legal title of the patentee not affected by such sale.

THIS case was adjourned from the county of Sandusky.

Judge LANE stated the case and delivered the opinion of the court:

The facts of the case are agreed.

In 1817, Josephus B. Stuart became the purchaser from the 477] *United States of tract No. 5, in the "Sandusky Reserve," under the system of purchases from the United States which then prevailed, upon which he made the first payment.

In 1821, the purchase money being unpaid, he took the benefit of the laws then enacted, in an eight year's credit on the land.

In 1826 it was entered on the list for taxation, and the taxes of 1826–37 being unpaid, the land was sold for taxes to Strain, who took possession, and whose title is held by defendant.

In 1830 Stuart completed the payment of the land, and received patent from government, by which he claims title.

Counsel have discussed the question, whether the land was liable to taxation before patent issued, and whether the tax was properly levied. We entertain the belief that these questions need not be decided. The sale in 1827 transferred, at best, the title of Stuart which he then held, and his title then was equitable only. His subsequent acquisition of the legal title did not inure to the benefit of that purchaser, for the sale of his interest by the public officer, raised no estoppel against him as if he had transferred with warranty. Admitting, then, for present purposes, the legality of the sale, and that Stuart's interest passed by it, those rights being merely equitable, offer no defense to an action of ejectment by the holder of the legal title.

COFFINBERRY and DECKERSON, for plaintiff.

PARISH and SPINK, for defendant.

Vattier v. Lytle's Executors.

Judgment creditor purchases land on his own execution as defendant's property, takes a deed, and enters satisfaction. The title fails. He can not have the satisfaction set aside and a new execution awarded.

This cause was adjourned from Hamilton county. It was a *scire facias* setting forth that the plaintiff, in 1824, recovered a judgment against Lytle (then living), as survivor of St. Clair, for six thousand three hundred and sixty-seven dollars and seventy-four cents, besides costs; that in March, 1825, he issued a *fieri et levari facias* to the sheriff of Clermont county, which was levied upon one thousand acres, part of a survey of fifteen hundred acres in *the name of De Benneville; that the land was appraised [478 at eight dollars per acre, advertised, and in October, 1825, duly sold to the plaintiff upon a *venditioni exponas*, for the sum of five dollars and thirty-three cents per acre; that the proceedings upon the return of the execution were duly examined by the court, found correct, and the sheriff ordered to make a deed to the purchaser, which was done accordingly. The plaintiff avers that by the sheriff's return it appears he sold one thousand acres of land on the execution, when in truth only five hundred acres were levied upon, or are included within the boundaries set forth in the returned boundaries of the levy. He also avers that as the levy was made, and from thence hitherto, Lytle "had no right, title, interest, claim, or demand whatever, in, to, or over the land levied upon, either in law or equity," and all the proceedings upon the said execution are void in law. By means whereof the plaintiff, although appearing by the records aforesaid to have satisfaction for the sum of five thousand three hundred and thirty-three dollars and thirty-three cents, the amount of said sale, yet has, in fact, received no satisfaction upon said judgment, but the whole remains unsatisfied, and he has acquired no title to the lands sold and conveyed to him upon said execution. The writ of *scire facias* calls upon the defendants to show cause why the levy and all the subsequent proceedings, including the order of court, the deed, and satisfaction, shall not be set aside and vacated, and the plaintiff have execution for the full amount of his judgment, as it no execution had issued and been levied. Since the service of the

scire facias, Lytle has died, and his executors have been made parties. They demur generally to the writ which is joined.

D. J. CASWELL, for the plaintiff:

The object of the plaintiff is to avoid a satisfaction entered of record *by mistake*, so that he may be enabled, by a new process, to make the money due upon his judgment.

This proceeding by *scire facias* is in the nature of a bill in equity, and the relief prayed for is sought upon two grounds:

1. That the sheriff, by mistake, levied upon and sold to the plaintiff a tract of land to which the execution defendant had neither possession nor claim of title, and that satisfaction has been entered of record for such sale by mistake, no real satisfaction having been obtained.

479] *2. That the sheriff levied upon the land mentioned in the writ of *scire facias*, as a tract containing one thousand acres, sold the same by the acre; whereas, in truth and in fact, the actual quantity of land contained in the tract was less than that sold by the sheriff, and for which satisfaction was entered, by more than five hundred acres.

The sheriff not only mistook the number of acres, but the entire tract, and actually sold to the plaintiff the whole town of Williamsburgh, to every portion of which, as well as the tract surrounding the town, the defendant had parted with his title before this judgment was obtained.

There can, therefore, be no doubt but that equity requires that the sale should be set aside, and the satisfaction vacated, as the plaintiff can never derive any benefit from his purchase, and the defendant has sustained no loss by the sale. The plaintiff, by this mistake and delay, has lost his lien upon other property, and may consequently be postponed to the sagacious and industrious creditor; but, as between the plaintiff and defendant, I can see no reason why the entry of satisfaction should not be vacated, and the plaintiff permitted to proceed against such property as he can find, or remaining assets in the hands of his administrator.

The only ground upon which the defendant can claim to have a credit entered on the judgment, is that something has been paid; that some interest of his has been disposed of, for the benefit of the plaintiff.

In this case nothing has been paid, nothing has been received.

It is an attempt on the part of the defendant to retain an unconscientious advantage, originating in the mistake of the sheriff, and the court are called upon to lend their aid to and sanction the measure, by a misapplication or perversion of the maxim "*caveat emptor.*"

That we are entitled to relief, and that this is the proper mode of seeking it, see the case of Arnold *v.* Fuller's Heirs, 1 Ohio, 458; 1 Root, 453; 6 Bacon's Ab. 120; 4 Day, 222. The court is respectfully requested to examine the reasoning in those cases, and also in 5 Cowen, 38, before they refuse the relief here sought.

Upon the second ground, also, I suppose the plaintiff entitled to relief.

*If the land had been sold by the tract, without reference [480 to the quantity, for five thousand three hundred and thirty-three dollars and thirty-three and one-third cents, the plaintiff might be compelled to pay that amount, although the quantity should be less than he expected. But in this case, the valuation was by the acre, the sale was by the acre, and if a credit had been obtained upon the judgment for the above amount, upon the supposition that there were one thousand acres of the land, I can not see why the plaintiff should not be permitted to show by proof the extent of the deficit. No reason can be assigned why the defendant should have credit beyond the amount of the sale.

C. Fox and E. S. Haines, for the defendant:

It is difficult to perceive upon what grounds the plaintiff can sustain this suit. He complains of no fraud or misconduct on the part of Lytle, does not suggest that Lytle induced him to levy on the property mentioned in the writ, nor that he did not know, or had not as good an opportunity of knowing the actual situation of the title to the property at the time he purchased as since. He complains of no irregularity in the proceedings of the officer on the executions; in short, he has no complaint, except that he bought General Lytle's right to a tract of land, whatever that right was; and now he finds fault, that Lytle had not so good a title as he expected, and, therefore, he wants this court to declare the levy, valuation, sale, and deed utterly void.

If there is any authority to be found to sustain such a principle, we know not where it is.

It is a rule applicable as well to sheriffs' as to private sales, and

to which there is no exception, that the purchaser of real estate, where there is no fraud, must be satisfied with the title and covenants of his grantor. If the title is bad, and he does not secure himself by covenants, he must bear the loss. There is no implied covenant as to title to real estate. The maxim *caveat emptor* is applied in its fullest force to such sales. The law on this subject is collected in 2 Caine, 191, 192.

This doctrine is peculiarly applicable to purchasers of real estate on execution. As remarked by the court in Thayer and Sturgis *v.* Sheriff of Charleston, 2 Bay, 171, "These sales are made by operation of law, in which the will and consent of the defendants are 481] never consulted. They are forced *upon them, whether they assent or dissent to or from them, and it is their right, whatever that may be, more or less, that is sold by the sheriff. Again, there is no warranty in law, either express or implied, raised on any of the parties concerned in such sale, neither on the part of the former owner, the defendant, nor the sheriff. Again, every man who goes to a sheriff's sale ought to take care and examine into the title of the defendant carefully before he attempts to bid." See also 5 S. & R. 225; 9 S. & R. 138; 1 Call, 24.

We conceive, therefore, that were this the case of any other purchaser than the judgment creditor, there could be no pretense of his being entitled to any relief on account of defect of title.

Is there any reason for making a distinction between purchasers? When a judgment creditor undertakes to purchase the property of his debtor, he places himself on a level, as to the rights, with all purchasers; if he realizes a good bargain, he is fortunate; if he makes a bad bargain, he is in the same situation as others who are disappointed in their speculations. He has no rights as a purchaser which other purchasers are not invested with. If, then, any other person purchasing under the same execution could have had no relief on account of a want of a title in Lytle, the plaintiff can have no relief.

But it is supposed that the case of Arnold *v.* Fuller's Heirs, 1 Ohio, 463, has some application to the case favorable to the plaintiff. We think that case decides nothing favorable to the plaintiff. In that case, the proceedings subsequent to Fuller's death were adjudged irregular and void. The decision is nothing more than the recognition of a familiar principle, viz: whenever a judgment debtor dies before levy, it is irregular to proceed on the judgment

until there are proper parties in court. There is no irregularity pretended in the present case. The judgment was properly obtained; there was no change of parties; the execution was issued, levy made, land sold, sale confirmed, and deed made, while the parties were all living. There is not a single feature, therefore, presented in this case, which formed the foundation of the judgment in the case of Arnold *v.* Fuller.

The simple and only proposition presented in the present case is, whether the mere fact of Lytle's having no title to the land sold is sufficient to induce the court to set aside the sale. We think not. We think that if such applications are listened *to, [482 there will be no end to litigation. The judgment creditor is the last man that ought to be permitted to make such an objection. He knows, or ought to know at the time of making his levy, what right the judgment debtor has, and if he buys that right he ought to be held to his bargain. He brings the property to sale at such time as he pleases, and has, in short, the whole control of the sale and bid, while a third person, who happens casually to attend the sale, has no such control over the matter. The one, we have shown, could not resist the payment of the money on the ground of the title being defective. We think the other stands in no better situation.

Judge WRIGHT delivered the opinion of the court.

This is not a case of void process, nor one where satisfaction has been entered upon a judgment by mistake. The case of Arnold *v.* Fuller, 1 Ohio, 466, and that of Stoyd *v.* Cady, 4 Day, 222, were both to vacate a satisfaction growing out of void process. The writ of execution in the case before us was valid, and the levy, appraisement, sale, examination by the court, order for deed, and the execution of the deed, all in fact took place. The case discloses an alleged after discovery of a failure in the title of the judgment debtor, whereby the plaintiff failed to realize the satisfaction or the profit he expected, wherefore he prays that all the proceedings may be set aside, and an opportunity afforded him to proceed again by new execution.

The maxim *caveat emptor* applies to all purchasers at sheriff's sale. In Smith *v.* Painter, 5 Serg. & R. 225, the judge pronouncing the opinion of the court, says: "The sale by sheriff excludes all warranty. The purchaser takes all risks. He buys on his own

knowledge and judgment. *Caveat emptor* applies in all its force to him. If this was not the law, an execution, which is the end of the law, would only be the commencement of a new controversy." The defect of title is no reason for setting a sale aside which has been fairly made. If there is fraud, that will affect sales by sheriffs as it will all other sales. A case is reported in 9 Serg. & R. 156, of a suit brought by the sheriff for the purchase money. The defendant pleaded that the judgment debtor, at the time of the levy, etc., had no estate, right, title, or interest in the land sold, having, *bona fide*, sold and conveyed it by deed of prior date. The court held it no defense that there was no title. They say: "It is a mistake when it is supposed the sheriff sells a sound 483] *title. He sells the claim of the defendant, and no more; as free and as clear an estate as the debtor held." The same doctrine is recognized in 11 Serg. & R. 138, and 1 Call, 24.

If we were disposed to disregard the maxim *caveat emptor*, and introduce a new rule, how would the case before us stand? Has the plaintiff entered upon the land he purchased and been evicted? Or does any one dispute his right to hold? Is the land still vacant, and has there been no attempt on the part of the purchaser to obtain the possession? Has he tried his title at law, and been defeated? The averments in the writ do not respond to these inquiries. The allegation is that the defendant had no title at the time of the levy, and has acquired none since. There is no express allegation that the title is outstanding in any one else. It seems to be an attempt in this way to try the title of the judgment debtor in the land levied upon, at the instance of the plaintiff, and purchased by him. The writ, indeed, calls upon the defendant to set forth his title and assert a claim, if upon examination it shall be adjudged insufficient for any cause, that the levy and all subsequent proceedings may be vacated; though, perhaps, the cause for which the title is adjudged insufficient may be that of a conflicting claimant, who may never set it up, or in any way use it against the right of the purchaser. It has more the appearance of a bill in chancery for discovery and relief, than a writ of *scire ficias* to assert a mere naked legal right.

We are of opinion the writ itself shows sufficient cause against granting its prayer, and sustain the demurrer. Judgment for the defendants for costs.

GEORGE D. SITES *v.* KELLER AND SKINNER.

Upon parol contract for the sale of lands, mere payment of the consideration does not take the case out of the statute of frauds and perjuries.

THIS cause was adjourned from the county of Hocking, upon the following state of case: The bill charges that the defendant, Keller, being possessed in fee of the northwestern quarter of section 25, town 14, range 16, on or about April 1, 1831, contracted with complainant through the agency of one Jonas Criglow, who was thereunto duly authorized by complainant, *and for the [484 consideration of a certain stallion known by the name of "Paymaster," which said stallion was there and then delivered by said Criglow to the defendant, agreed to sell and convey complainant, by deed in *fee simple*, to be delivered to complainant within a reasonable time, the tract of land aforesaid. The complainant confiding, etc., by his said agent bargained with the defendant, and agreed to give and deliver said stallion to him for the consideration of said land so to be conveyed as aforesaid, and did there and then by his said agent, in full performance of his part of said agreement, deliver said stallion as aforesaid to the defendant, who received said stallion in full of the price and consideration of said land.

That said defendant (as complainant is informed and charges) after said contract was made, and with a view to the performance thereof, executed a deed for said tract of land to complainant, and delivered the same to one Daniel Skinner to be by him delivered to complainant, but that said defendant, at the time he delivered said deed to said Daniel, instructed him not to deliver it to complainant, unless he (complainant) would pay said Daniel for the use of defendant twenty-five dollars, which complainant avers he was in nowise bound to do the contract aforesaid. That said Daniel being thus limited has not yet delivered said deed, but refuses so to do, unless complainant will pay the twenty-five dollars. That a reasonable time has expired for the performance of said contract by the defendant, but that he has wholly neglected, and now refuses to perform the same.

That defendant Keller, further intending, etc., has recently bargained with the defendant, Skinner, and agreed to convey said

tract of land to him. That such conveyance is not yet made, and that said Skinner has not paid to said Keller any part of the purchase money by him agreed to be paid for said land, and that said Skinner has full notice of complainant's equitable right in the premises.

Prayer for process against the defendants for a specific performance by Keller of his contract with complainant, and for general relief.

The defendant, Keller, plead, that neither he, nor any person by him lawfully authorized, did ever make or sign any contract or agreement in writing, for making or executing any deed or other conveyance to said complainant of said tract of land or any part thereof, or to any such effect, as by the bill is suggested, or 485] any note or memorandum thereof in writing, etc. *And that he did never execute a deed, and deliver the same to one Daniel Skinner, to be by him delivered to the said complainant, with a view to the performance of said pretended contract; but with a view if practicable of disposing of said tract of land on terms, upon a consideration yet to be fulfilled and complied with, and in such event to be delivered, otherwise of no validity, etc.

The case came before the court for hearing on the bill and plea.

HUNTER, for complainants:

Upon the state of the pleadings now presented to the court, the distinct and only question is, whether "full payment of the purchase money is a sufficient part performance of a parol contract for the sale and conveyance of lands, to take it out of the statute of frauds."

We have not been able to find any case in England or America, in which this question has been presented, except a case referred to in Freeman, 281, decided by Lord Nottingham. Frequent references are made to this case, but the one stating the point decided most distinctly is in a note (1 Sch. & Lef. 40), where it is said to have been decided by Lord Nottingham, "when the purchase money was paid, and the deeds refused to be sealed, that they should be sealed." All of the cases on this subject in England, in which there would seem to be much conflict of opinion, have been cases in which part only of the purchase money has been paid. And although there is undoubtedly a difference of opinion to be found in the cases, it is yet quite obvious that the weight of

authority is in favor of the position, that payment of a substantial part of the purchase money will take a case out of the statute.

In the note above referred to, 1 Sch. & Lef. 40, New York edition of 1808, the authorities on both sides are stated. Opposed to the position that payment will take a case out of the statute, are the following cases, viz: Seagood *v.* Meale, Prec. Chan. 560; Lord Fingal (or Pengal) *v.* Ross, 2 Eq. Cas. Ab. 48, and what is said *arguendo* in Coles *v.* Trecathic, 9 Ves. jr. 242, to which list may be added the case of Clinan *v.* Cooke, 1 Sch. & Lef. 40. On looking into these cases it will be seen the part payment relied upon has been but *an inconsiderable sum. In the first case, Sea- [486 good *v.* Meale, the payment was one guinea.

The cases referred to on the other side are Lacon *v.* Morton, 3 Atk. 1; Main *v.* Melbourn, 4 Ves. jr. 720, and Buckmaster *v.* Harrop, 7 Ves. jr. 341. In truth, the case of Main *v.* Melbourn should perhaps have been enumerated with them in support of the other side of the proposition, as the decree in the case was against the relief, on the ground that the part payment relied upon, being only five per cent. of the purchase money, was too insignificant a part. But it was proper at the same time to be referred to, as an authority in support of the other position, that payment of a substantial part does not lay the foundation for relief. The language of the chancellor is strong and decided that way. He says: "Payment of part of the purchase money is certainly a part performance; but this five per cent. is mere earnest." And, again, he says: "It is not disputed that if part of the purchase money substantially is paid, that it takes it out of the statute," etc. This case was decided in 1799, and is the last of note before the case of Clinan *v.* Cooke, decided by Lord Redesdale, in 1802. There are many other cases touching this point besides those referred to in the cases above cited, most of which, however, are cited in those cases. And although it is said by Lord Redesdale, in the case of Clinan *v.* Cooke, that "it has always been considered that payment of money is not to be deemed part of performance to take a case out of the statute," it must be manifest his lordship was, in some degree, in error in that particular. That, in fact, at the time he made the remark, the weight of authority was clearly the other way, except in cases where the part payment was of an inconsiderable sum. Indeed, the only case referred to by his lordship, in support of the position, is that of Seagood *v.* Meale, in

which the sum paid was only one guinea. It is true, after this decision by Lord Redesdale, it was looked upon as in some measure settling the question. It was so viewed by Mr. Sugden, in his treatise on Vendors and Purchasers. But no such sanction has ever been given judicially so far as can be ascertained.

The case of Lacon *v.* Morton, above cited, was a parol contract to convey lands in consideration of three hundred pounds, two-thirds of which was paid in hand. By accident the estate became more valuable after the contract, and the vendor agreed to pay one hundred and forty pounds more. The case was held to be 487] out of the statute. And in *case of Child *v.* Comber, 3 Swans. 427, payment of counsel fees, drawing drafts and engrossing them, and preparing purchase money was holden to take the case out of the statute. This case is long subsequent to that of Clinan *v.* Cooke, and may be considered as overruling it.

W. W. IRWIN, for defendants:

Section 5 of the act for the prevention of frauds and perjuries, provides that no action shall be brought whereby to charge the defendant upon any contract for the sale of lands, tenements, hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.

In Great Britain, after the passage of the act of that country for the prevention of frauds and perjuries, it became a question whether the part payment would take a case out of the statute; and if so, what sum would suffice for that purpose. The subject underwent much discussion, and there are contradictory decisions; but it seems to be now settled that payment of the whole of the purchase money will not give validity to a parol agreement in relation to lands.

Sugden, in his treatise of the Law of Vendors, page 80, after giving a view of the decided cases, says, "that since the above observations were written, a decision of Lord Redesdale has appeared, in which he held clearly that payment of the purchase money is not a part performance, and although his lordship

did not advert to all the cases on the subject, yet it is sincerely hoped that his decision will put the point at rest."

The reason assigned by the chancellor why payment will not take a case out of the statute is, that the statute has said that in another case, viz: with respect to goods, it shall operate as a part performance. And the courts have heretofore considered this as excluding agreements for lands, because it is to be inferred that when the legislature said it should bind in case of goods, and were silent as to lands, they meant that it should not bind in case of lands.

*This process of reasoning is resorted to by the chancellor, [488 for the purpose of arriving at the intention of the legislature, and having found it, he refuses to depart from it.

By our statute, the agreement is declared to be inoperative, unless it be reduced to writing, and signed by the party to be charged. If the legislature intended to exclude contracts, where payment or part payment of the purchase had been made, from the operation of the statute, it certainly would have been so expressed. The design of the legislature was to prevent litigation, by rendering certain all contracts relating to land. Indeed, it may be said to be vitally important to the well being of society, to reduce disputes in relation to land titles to the smallest possible number. Will this be effected by the exclusion of this great class of cases from the provision of the act? Can any one for a moment suppose that such was the intention of the legislature.

In the case of Phelps v. Thompson, 1 Johns. Ch. 146, it is asserted, by the chancellor, that unless the plaintiff has clearly established the contract, as charged, and also a part performance of the same contract, he has not entitled himself to the relief sought. This opinion shows the propriety of considering the plea in connection with the answer, and is here referred to for that purpose.

In the course of his remarks in that case, Chancellor Kent observes, "that (that) case, like many others, shows the utility of the statute of frauds, and the danger of relaxing the sanction of its provisions. I agree with those learned judges," said the chancellor, "who have declared that 'the courts ought to make a stand against any further encroachment upon the statute, and not to go one step beyond the rules and precedents already established.'"

So far as I have examined the subject, it is to prevent fraud that

parol agreements in relation to lands, partly performed, have been specifically decreed. When payment of the purchase money is all that has been done, then it can be recovered as in other cases when there has been a failure of consideration. But when the purchaser has taken possession, and made improvements with the knowledge and assent of the vendor, it presents a very different case. To compensate him would require an estimate of his time and expenses in taking possession; the value of the improvements, and also an estimate of the losses and inconveniences he 489] would be put to in breaking *up his settlement and seeking a new home. The fact of the vendor's looking on, and seeing improvements made, when he intended to avoid the agreement, amounts to a fraud, and it is upon that ground that relief ought to be afforded, and not on a strained construction of the act in search after the intention of the legislature, which neither reason nor common sense will warrant.

The positions here assumed are fully warranted by the decision of this court in the case of Wilber *v.* Paine, 1 Ohio, 254. The court say, it has been repeatedly decided by them that part performance may take a case out of the statute, and although the policy of such exceptions have been questioned, they were induced to believe that if admitted with caution, they might have a salutary tendency in preventing fraud. The court further say, that no case had been decided by them from which any general rule could be inferred as to the description of part performance that would take the agreement out of the statute. The court also assert, that it has been settled in England, that payment of money alone will not do it.

From the most attentive perusal of this case, I can see nothing to warrant the belief that the court intended to lay down any rule that would enlarge the class of cases that should be exempt from the provisions of the statute. So far from this being the case, the reasoning of the court has satisfied me that it was not their intention to go farther than was absolutely necessary to prevent just the same kind of frauds that have given rise to the equity jurisdiction of this subject.

Judge LANE delivered the opinion of the court:

This case fairly raises the question, whether the payment of consideration, in an agreement for the sale of lands, removes it from the operation of the statute of frauds. The statute was prob-

ably intended by its makers to take away the right of action upon every executory parol agreement. But it was immediately found, that by this strict construction, a law intended to prevent fraud became the instrument to effect it. Whenever a denial of relief in equity would produce the evils which the statute was enacted to suppress, it became necessary to sustain the validity of the agreement, although not in writing. Whenever an agreement has been partly performed, and the terms of it are confessed, or are satisfactorily found, it will be enforced *notwithstand- [490 ing the statute. Acts of part execution to be attended by this consequence must be of the substance of the agreement, or such that the party executing "would suffer an injury amounting to fraud" by the refusal. Possession taken and improvements made are acts of this kind. Whether the payment of the part or the whole of the purchase money produces this effect, has been the subject of contradictory adjudication. The cases are cited in the elementary books. 1 Mad. 381. The earlier decisions admit the doctrine; but is doubted or denied by all the later opinions, and the law is summed up in 1 Dane, 248, "on the whole it appears, though not clearly, that merely paying purchase money does not take the case out of the statute." A good foundation subsists for this distinction. After such acts of performance as possession or improvements, to rescind the contract would not restore the parties to their original situation; but full compensation for the payment of the purchase money is made by the restoration of principal and interest.

Plea sustained. Bill dismissed without prejudice to his rights at law.

Bradly v. Sneath.

If, upon appeal from the common pleas to the Supreme Court, no bond is taken, the jurisdiction of the Supreme Court does not attach, and exception may be taken by the appellee, after trial and verdict agninst him.

Appeal does not lie from a nonsuit, unless it is shown by the minutes that such nonsuit was ordered by the court.

An appealed cause may be retained, that application may be made to amend in the common pleas.

THIS case was adjourned from the Supreme Court in Seneca county, where it was docketed as an appeal from the common pleas. The proceedings of that court, as certified up under the statute, show that the parties appeared, a jury was impaneled there to try the issues, and that the plaintiff "thereupon fails further to prosecute his suit, and the jury were discharged." Judgment was rendered against the plaintiff for costs. He gave notice of appeal. There is no evidence that an appeal bond was given. At the late term of the Supreme Court in Seneca, the cause was tried to a jury, and a verdict found for the plaintiffs for eight hundred dollars damages. After verdict, the defendant moved the court to strike the cause from the docket for want of jurisdic-
491] tion, which was *reserved for decision here. He also moved in arrest of judgment and filed his reasons, which the decision of the court makes it unnecessary to state.

O. PARISH, in favor of the motion, argued:

The record of the common pleas shows that both parties appeared, and caused a jury to be sworn to try the issue, and then the plaintiff failed to prosecute his suit further. There was no action of the court in the controversy. The plaintiff voluntarily abandoned the prosecution. He voluntarily became nonsuit. From such a proceeding the plaintiff can not, by the law of Ohio, appeal. 29 Ohio L. 75, sec. 96, Practice Act. As well might the plaintiff have stood mute when called, and refused to answer (when he certainly must have been nonsuited), as to appear, impanel a jury, and then refuse to say anything farther in his case. No matter in what language the record of the common pleas is made up. The fact that plaintiff became nonsuit is palpable on the face of the proceedings of that court. No matter whether this proceeding is called nonsuit, discontinuance, retraxit, or dismissal, he can not appeal to the Supreme Court.

The jury gave no verdict; they were discharged from all consideration of the cause. The record shows that the plaintiff appeared, but would not answer. He would do nothing. The court could not but pronounce the judgment of the law. In effect, they have said, on their record, "the plaintiff refusing to give any evidence of his demand, or attempt to give any such evidence, he must be, he is nonsuited." I give no attention to the attempt of the plaintiff to patch up the record. The memorandums of the

president judge are not records. They are worthless, except they aid the clerk in making up the journals.

C. L. BOALT, for the plaintiff

In the court below, judgment of nonsuit was directed to be entered against the plaintiff for the alleged irrelevancy of his testimony. From this judgment the plaintiff appealed. In making his entry of the decision of the court, the clerk took no notice of the reason assigned for the nonsuit. At the term subsequent to these proceedings, the counsel of the plaintiff *moved the [492 court to amend the entry of the clerk from the notes of the presiding judge. The defendant now moves to strike the cause off the docket. We object:

1. The entry of the clerk was sufficiently full and explicit as made. It was not necessary for him to notice the particular reason or grounds of the nonsuit on the journal or transcript, in order to perfect in the plaintiff his right of appeal.

By statute, 29 Ohio L. 58, it is made the duty of clerks "to enter and record all the orders, decrees, judgments, and other proceedings of the courts." And in the practice act it is enacted that "for the purpose of preventing errors in entering judgments, orders, and decrees of each court, the judges thereof, before every adjournment, shall cause the minutes of their proceedings to be publicly read by their clerk, and corrected when necessary, and that these minutes shall be carefully kept among the records." 29 Ohio L. 94. The necessary inference from these clauses of the statutes is that these minutes of the clerk constitute no part of the records.

The clerk is to enter and record; the entries are to be preserved among the records; they are to be read for the purpose of detecting errors, and are ultimately to be used by the clerk in making out a complete record of all the proceedings in the cause during the vacation subsequent. This construction is fully recognized in Marvey *v.* Brown, 1 Ohio, 268, in which it is decided that "these minutes can not be considered as the foundation for an assignment of errors." The minutes are the *data*, the *memoranda*, to aid the recollection of the clerk afterward, when from lapse of time the leading facts might have escaped from his memory. Admitting that an omission of this kind would have vitiated, had it appeared upon the record itself, we believe that it may easily be overlooked

in the minutes, which seldom contain but a part of the materials from which the record is formed.

What is the duty of the clerk in case of appeal? He is to make an authenticated transcript of the docket or journal entries, and of the final judgment or decree. 29 Ohio L. 79. In the case before the court he has complied with this requisition to the letter. He has sent up a transcript of the docket and journal entries, and of the final judgment, that of nonsuit; and now, with this transcript on file after verdict and damages found, a motion is made 493] to set the whole proceedings *on the appeal aside, because the transcript omits to state the reasons that induced the court below to nonsuit us.

In sustaining this motion the defendant must assume one of the two following positions: 1. That the judgment should have been entered on the journal of the clerk as "a judgment of nonsuit for irrelevancy of testimony," making the phrase "irrelevancy of testimony" a necessary adjunct to nonsuit, and descriptive of the judgment; or that the reasons for the decision of the court below should have appeared elsewhere upon the entry and transcript. In regard to the first position, we submit that no such judgment as that of "nonsuit for irrelevancy of testimony," as distinct from that of nonsuit without such adjunct, is known to the law. True it is, that under our statute a plaintiff can appeal from a judgment of nonsuit in three specified cases only. But in making provision for these cases, we see no reason for the belief that the legislature contemplated any new judgment, or any change in the form of entry. If so, the several circumstances that confer upon the plaintiff the right of appeal should be entered upon the journal as matter of description in other cases as well as in this. We should then have in our practice and upon our records not only the new, (and before the passing of the act above referred to) unknown, and unheard-of judgment of "nonsuit for irrelevancy of testimony," but likewise the equally unheard-of and uncouth judgments of nonsuit, by reason that the testimony adduced did not support the case in the declaration, "and the judgment of nonsuit, by reason that the testimony was arrested from the jury."

If the second position be well founded, it becomes incumbent upon the clerk, not only to enter the judgment of nonsuit itself, but also the reasons that induced the court to pronounce such judgment. The court is to make an entry (in the language of the

statute) "of the orders, decrees, judgments, and other proceedings." From this it would seem evident, and it accords with the practice of this officer, that he is to note down certain facts, and not opinions on the evidence of those facts—judgments, and not the grounds or reasons of those judgments. We are well aware that it has been repeatedly decided that a plaintiff could not appeal from a judgment of nonsuit. But the present statute which confers that right, under certain circumstances, has prescribed no new form for the entries of the clerk, nor in terms, imposed upon him any additional duties. *Had such been the intention [494 of the legislature, would they have been silent in a matter so important to parties and to the ends of justice? In thus providing a remedy for a plaintiff, who had been wrongfully turned out of court, is it reasonable to suppose that they would, in this manner, designedly have left in his path such a nicely-covered pitfall to entrap and destroy him? Would they not have specially pointed out the duty of the clerk in such cases, and in so doing made the remedy effectual? But we have no such special provision in the statute, and conceive that the manner in which the duty of the clerk, in appeal cases, is pointed out, excludes the inference that any was intended. The rule above referred to of the practice act applies to all cases alike—to appeals in nonsuit as well as in others. "The clerk is to make an authenticated transcript of the docket or journal entries, and of the final judgment or decree."

Should the court be against us on our first ground, they will allow us to amend the journal entries and transcript, and continue the cause to allow time for the motion to that effect in the court below.

At common law, we admit that the judgment record and other memorials of the proceedings of courts could be amended only during the same term in which the proceedings took place. The doctrine was, that such proceedings might be amended while in *fieri*, and they were so considered in *fieri* during the term in which they transpired. But this ancient strictness is done away, and where justice requires it, amendments are allowed at any time during suit on the proceedings; and these are considered in *fieri* for the purposes of amendment until final judgment and record enrolled. This, it seems, was the common law doctrine, 6 Davies' Ab. 184, before the statutes of jeofails. At common law, as no-

final record is yet made up in this case, we have a right to amend the journal entry.

The books are full of instances in which amendments have been directed under circumstances against the applicant stronger than those here presented. We ask merely for permission to amend, for the purpose of showing the true cause for which judgment was directed to be entered against us, and for leave to do this from the notes of the presiding judge. It is not an application to alter the effect or operation of the judgment of this court, but to supply on the transcript the facts that lead to it, in order that it may be good 495] as it stands, not in matter of *substance, but in matter of form merely for misprision of the clerk.

The slips and mistakes of the clerk are more favored than those of the party. 1 Johns. 276; 6 Dan. Ab. Ch. 184; Salk. 50; Cro. Eliz. 760.

In 3 Johns. 526, the action was entered by warrant of attorney, but by the attorney's negligence the defendant's plea was not signed by him, and appeared nowhere upon the face of the record. The court allowed the plaintiff to amend the record *nunc pro tunc* by inserting that name, though an after judgment had been given against the defendant on which a performance was claimed. For the practice of our own courts, see 2 Ohio, 32; 1 Ohio, 375; 5 Ohio, 337, which seem full to the point.

Judge WRIGHT delivered the opinion of the court:

Two objections are made to the jurisdiction of this court:

1. The want of an appeal bond.

2. That the appeal, if taken, is from a voluntary nonsuit.

As to the first objection, it has been repeatedly decided that the appeal bond, in due time and form, was necessary under our system to remove a cause by appeal from the common pleas; and whatever may be our individual opinions upon the expediency of those decisions, they have been made and acquiesced in, and it is improper for us to change them. The statute expressly provides that parties desirous of appealing from the judgments of the court of common pleas, shall do the following things to effect the appeal: 1. Give notice during the term when the judgment is rendered, on the minutes of the court, of the intention to appeal. 2. File within thirty days after the last day of that term with the clerk a bond to the other party, in at least double the amount of the

judgment, conditioned to pay the condemnation money and costs in the Supreme Court, if judgment shall be entered there in favor of the appellee, and with security to be approved of by the clerk. 29 Ohio L. 78. A compliance with these requisitions is held necessary to vacate the judgment of the court of common pleas. The jurisdiction of the Supreme Court only attaches to the case when the judgment rendered in the court of common pleas has been thus vacated. If the parties to a judgment, after its rendition, should agree orally, or in writing, that the judgment was vacated, would such agreement have the legal effect of vacating the judgment *ipso facto*? Were suit brought on the original cause *of action after such agreement, and former recovery was [496 pleaded in bar, could the plea be avoided by replying over the agreement? Upon common legal principles the replication would be adjudged bad on demurrer. Judgments can not be discharged by parol; inchoate rights may be. We are asked in the case at bar to take jurisdiction without evidence that the judgment of the common pleas has been vacated. That a compliance with the requisitions of the statute is essential to the jurisdiction of this court, has been held in Wilson *v.* Holman, 2 Ohio, 253; Bliss *v.* Ling, 5 Ohio, 276, and *ante*, 34, and by numerous decisions on the circuit not reported. A jurisdiction dependent upon the agreements of parties only constitutes the judges arbitrators; and if they act at all under such authority, they act as arbitrators—not as public ministers of justice. It is, however, insisted that a bond was in fact filed. It would be convenient if the clerks of the common pleas would send up with the papers either the original bond or a copy of it. He is the judge of the sufficiency of the security, and should indorse on it the fact of his approval and the time of filing. These facts appearing in the proceedings certified up, the delays now so frequent, occasioned by disputes in relation to these facts, would be avoided, and this court would know whether its jurisdiction attached to the case. The fact of there being a bond in this case can be shown, if it exist.

Will an appeal lie from a voluntary nonsuit? The act of assembly, 29 Ohio L. 75, provides for an appeal, when the court order a nonsuit by reason of the irrelevancy or insufficiency of testimony to support the plaintiff's declaration, and where nonsuit results from the courts arresting the testimony from the jury. All these cases, which are exceptions from the common rule, sup-

pose the interposition of the court. This is essential to the appeal. The case before us shows no such interposition. The common rule does not allow an appeal from a voluntary nonsuit. It is, however, urged that by the docket of the judge presiding in the court of common pleas, it does appear that the court below ordered the nonsuit.

We are asked to amend the entries of the court of common pleas so as to conform them to the minutes. We can only notice the proceedings of the court of common pleas when properly certified to us. The objection made to such amendment, that it is matter of record, has no legal foundation. By the present law, 497] no record is made in the court of common *pleas, when a case is appealed, unless ordered by one of the parties; the original papers, with a copy of the journal and docket entries, are sent up. If the case, then, was appealed, there is probably no record—none of course, or without the special order of one of the parties, and no such order appears. Nothing remains in the common pleas but the docket and journal entries of the proceedings and judgment of the court. The docket kept by the presiding judge contains his original minutes of the doings of the court. It is from this the clerk generally makes his journal entries. We see no impropriety in that court correcting the mistakes of their clerk in transcribing these minutes—correcting them by the original entries. It would be strange if the law prohibited such correction. The whole proceedings of the court of common pleas, if the cause has been appealed, is in paper, and may be examined, and any error of fact corrected. The decision on the motion may be suspended, to afford time to examine into the matter.

But the suit was commenced in August, 1823; the fourth count in the declaration alleges the words to have been spoken at the next term after when the declaration was filed. While examining, it may be well for counsel to inquire how to avoid this difficulty.

BELMONT BANK OF ST. CLAIRSVILLE *v.* WALTER B. BEEBE.

Declaration that defendant warranted a person applying to the plaintiffs for a loan to be a respectable man of Tuscarawas county, named Adam Riggle, and averring that the person was not Adam Riggle, whereby plaintiff lost the money loaned, held insufficient.

If in assumpsit, the undertaking is collateral and conditional, and notice should be averred.

If for deceit, an intention to deceive should be averred.

THIS cause was adjourned from the county of Belmont.

Judge LANE stated the case and delivered the opinion of the court:

This case stands before the court on a demurrer to the declaration. The plaintiffs declare, in a plea of trespass on the case, "that on November 25, 1830, at the county aforesaid, a person, to the plaintiffs unknown, made application and requested plaintiffs to loan him one thousand dollars for sixty days; that said person so unknown, referred the plaintiffs to the defendant, concerning his person, name, character, and standing; that *said de- [498 fendant, so referred to, in consideration that said plaintiffs would loan the said person the sum of one thousand dollars, warranted him, so unknown, and so applying, to be a reputable and respectable man of Tuscarawas county, of the name of Adam Riggle, and thereby induced plaintiffs to loan him one thousand dollars for sixty days. That plaintiffs, confiding in these representations, loaned the money; whereas, in fact, said person so unknown, and so warranted to be a reputable and respectable man of Tuscarawas county, by the name of Adam Riggle, was not a man of the name of Adam Riggle, of Tuscarawas county; by means of which defendant, falsely and fraudulently, deceived the plaintiffs on the loan aforesaid, and thereby said sum of money became wholly lost, and plaintiffs have been subjected to great expense in endeavoring to discover the name and residence of said person, and in recovering the money to their damage, one thousand eight hundred dollars.

The extreme indefiniteness, the utter want of precision, and the language used by the pleader in this plea, makes it difficult to understand his meaning, still more difficult to express it. I do

not know whether he intended the suit to be assumpsit or case, and it becomes necessary to examine if it can be supported in either.

Is it assumpsit? If it be a contract, it shows a loan made to another person, who was under a liability to pay; the liability of the defendant was, consequently, not absolute to pay at all events, but a liability arising from the default of the principal, to raise which he must have notice. The omission of this averment makes the count bad; when notice is omitted which ought to be averred, it is good after verdict, but bad on demurrer. 1 Chit. Pl. 287.

To make a good declaration in case for fraud, it is necessary to show that he made the affirmation fraudulently with the intention to deceive, or knowing the contrary to be the truth. No such character is attached to them by the pleader, except near the close, where he states that, by means of the premises, the said plaintiff falsely and fraudulently deceived the defendant. This seems rather an inference of the plaintiff than a direct averment of the fact. Such an averment was held good after verdict in New York. 11 Johns. 550. But it seems to have been there sustained only because objection was taken so late.

But in this statement of the cause of action, it is not shown 499] *how any injury arose from the act of the defendant. He is said to have warranted the person to be a respectable and reputable man of Tuscarawas county, of the name of Adam Riggle, whereas he was not a man of Tuscarawas county by the name of Adam Riggle, by means of which he deceived the plaintiff, and the debt was lost. He does not show how it was lost. If it was John Riggle instead of Adam, or if it were Adam Riggle of Belmont county, the representation would not be true, yet no injury would necessarily follow.

It is not shown that the person was not Adam Riggle, or that there was no such man. It seems to be indifferent to the plaintiff; whether the representation was true or not, the inference must follow the premises, the injury must be shown to arise from the representation, or the pleading is ill.

Demurrer sustained.

HUBBARD, for plaintiff.

COWEN, for defendant.

Joseph Hunter's Will.

When the judges of the court of common pleas are so interested that a quorum can not sit to take proof of a will, the case can not be certified to the Supreme Court for taking such proofs.

The last will and testament of Joseph Hunter was presented to the court of common pleas, in Franklin county, at June term, 1834, by the executors therein named, for probate. There not being a sufficient number of disinterested judges of that court to form a quorum, the application and the will was certified to the Supreme Court. The will was again offered for probate in the Supreme Court, the evidence taken, and the questions arising under it reserved for decision in bank.

G. Swan, for the application, cited 3 Bl. Com. 295; Jac. Law Dic., Action; 1 Inst. 285.

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Judge Wright delivered the opinion of the court:

The jurisdiction of the Supreme Court to hear the probate of a will, is sought to be maintained under the provisions of section 63 *of the practice act, 29 Ohio L. 70, in which it is enacted, [500 that if, in any suit or action in the court of common pleas, it shall so happen that there is not a sufficient number of disinterested judges of such court to sit on the trial of any particular cause there pending, it shall be the duty of the court, on the application of either party, to cause such fact to be entered on the minutes of the court, and to certify the fact with the papers to the next Supreme Court. The Supreme Court is thereupon to take cognizance of the case, and proceed to hear and determine it in like manner as if it had been originally commenced in that court. No question is made but the certificate of the court of common pleas in this case conforms to the law, if the case be one which that court was authorized to certify up, and which the Supreme Court is empowered to take cognizance of.

The jurisdiction of our courts depends upon the constitution and laws of the state. The constitution imparts to the Supreme Court capacity to receive jurisdiction, "both in common law and chancery, in such cases as may be directed by law." Const., art. 3, sec. 2.

The like capacity is conferred upon the court of common pleas, to "have conmon law and chancery jurisdiction in all such cases as shall be directed by law." Another and distinct section of the constitution confers upon that court "complete criminal jurisdiction," and in another section it is declared, that the court "in each county shall have jurisdiction of all probate and testamentary matter, etc., and such other cases as shall be prescribed by law." Const., art. 3, secs. 3, 4. The act organizing judicial courts confers original jurisdiction upon the Supreme Court "in civil cases, both at law and in equity, where the matter in dispute exceeds one thousand dollars, and appellate jurisdiction from the court of common pleas in all civil cases in which the court of common pleas has original jurisdiction." The same act confers upon the common pleas original jurisdiction in all civil cases, in law or equity, where the sum in dispute exceeds the jurisdiction of a justice of the peace; and gives the court power to take probate of wills, to grant letters testamentary thereon, to grant administration upon intestate estates, and to hear and determine all case of a probate and testamentary nature.

It is evident from these provisions, that the framers of both the constitution and law had in view the several distinct jurisdictions as distributed to the English courts, and exercised in that country 501] by the courts of common law and of chancery, *and by the ecclesiastical tribunals. In speaking of each, the appropriate language is used. The distinction is preserved throughout our legislation. The act to regulate the practice of the judicial courts directs the mode of practice in the courts of common law; the act directing the mode of proceeding in chancery directs the practice in the courts of chancery; while all subjects counected with the probate of wills, granting letters testamentary, of administration and guardianship, as well as the power of divorce (all matters pertaining to the ecclesiastical courts in England) form the subject of distinct and special legislative acts. This course of proceeding indicates a determination to keep those several jurisdictions as distinct and separate as can be done with our judicial organization.

The appellate jurisdiction of the Supreme Court is limited to civil cases at common law, in which the court of common pleas has original jurisdiction. 29 Ohio L. 56. In chancery cases, the appellate jurisdiction varies but little. No ecclesiastical juris-

diction original or appellate is expressly conferred upon it except in cases of divorce. The question before us is one of jurisdiction, of appellate jurisdiction. That is limited to civil cases in law and in equity. Is the probate of a will a civil case in law or equity within the meaning of the constitution or the laws? In the case of Chapman's will, *ante*, 148, this court decided that the rejection of the probate of a will was not within the provisions of the statute of wills, which gave an appeal "from the decisions of the court of common pleas, when any will or other motion relating thereto shall have been contested."

The act under which this proceeding has been certified up from the common pleas authorizes the removal of suits or actions pending there on the application of either party to the suit. We think the terms *suits* and *actions*, as used in the law, synonymous. It is evident the case to be removed must have at least two parties, for the removal is to be made on the application of either party. I should define an action to be an abstract legal right in one person to prosecute another in a court of justice; and a suit, the actual prosecution of such right in a court of justice. The application to make probate of a will is not included in the definition either of an action or suit. It belongs neither to the common law nor equity jurisdiction conferred upon the court of common pleas, but appertains to the ecclesiastical jurisdiction of the English courts, which is specially *conferred upon our courts of com- [502 mon pleas as courts of probate. The proceeding to make probate of a will is *ex parte*, not adversary. No process is required to notify any whose interests are to be affected. No one is necessarily before the court, other than the party applying to prove the will. No judgment is given. The order of probate is not conclusive upon the subject of it, for the statute law expressly provides a way in accordance with the common usages of chancery to contest and vacate the probate, if allowed. If rejected, another application may be made, and probate established on new and better proof.

It is urged that this case should be retained upon the principles on which the court retained the case of Rawson *v.* Boughtre, 5 Ohio, 328. That was an application to redeem lands sold for taxes. The court held it "in the nature of a suit or action, and took jurisdiction." But did so expressly on the grou..d that the proceeding contemplated by the statute for the redemption of lands sold for

taxes, was "an adversary litigation." It will be recollected that notice is required to the purchaser for taxes of the intended motion to redeem, that he may have day in court to contest the right to redeem the title of the party applying, and that the court is to make an order of redemption, award restitution of the premises, and direct the applicant to pay the costs. The analogy between that proceeding and the one before us does not hold in any particular. The proceedings to redeem land are summary, but adversary, and the decision or judgment made was final as to the rights of the parties. Probate proceedings are *ex parte*, and the order of the court, given either way, is not conclusive.

It seems to us the case is not within our appellate jurisdiction, or that provided for by the act for certifying causes from the court of common pleas, where so many of the judges of that court are interested in it as to leave them without a quorum. The application is, therefore, dismissed for want of jurisdiction.

503] *JOHN WORK *v.* HELEN MASSIE, EXECUTRIX OF HENRY MASSIE, DECEASED.

Executor resident out of the state, never having given bond here, not entitled to appeal, without giving appeal bond with security.

ADJOURNED from Ross county.

The case was debt, on a bond. The suit was commenced by the plaintiff against the defendant's testator in his lifetime, and revived against the defendant after his death.

Plea, the statute of limitations; replication of a demand within fifteen years; rejoinder taking issue on the execution.

The case was submitted to the court of common pleas and judgment given for the plaintiff. The defendant, who resides in Kentucky, gave notice of an appeal to the Supreme Court, but no appeal bond was ever executed, nor had the appellant given bonds as executrix in this state. For this cause a motion was made to quash the appeal.

LEONARD and SWAN, for appellant.

DOUGLAS, for the appellee.

Judge WOOD delivered the opinion of the court:

The question arising here is on a motion to dismiss the appeal, and the only inquiry, can executors, who have not given bond in in this state as executors, appeal without giving the security required of others. This must be determined by the construction given to our statute. Section 109 of the practice act directs the mode of perfecting an appeal. It prescribes the security to be given and the manner of giving it, but contains a proviso in relation to executors and administrators in these words: "That in no case shall administrators or executors be compelled to give bond and security to perfect an appeal, as is above provided." This act was passed on March 8, 1831, and took effect on the 1st of June of the same year. If this were the only law on the subject, no security could be required of the defendant to perfect the appeal in this case; the legislature, however, on the 12th of March, four days after the passage of this statute, in the act defining the duties of executors and administrators, 29 Ohio Stat. 242, sec. 44, have provided that every executor and administrator who may have given bond in this state (as such executor and administrator) may appeal *without giving security on such appeal. This act [504 took effect on the same day with that before mentioned, and in its repealing clause contains these words, "and all other acts and parts of acts coming within the purview of this act be and the same are hereby repealed."

Can these two statutes, in relation to the question before us, stand together? The first provides that no executor, etc., shall be required to give security to perfect an appeal; the last enacts that such executor, etc., as have given bonds in this state may appeal without security. If the statutes are not flatly contradictory, they can not be said to be consistent with each other. When the legislatures say that such executors and administrators as have given bonds in this state may appeal without security, is it not absolutely clear they intended to exclude all others who had not given such bonds? We think so; and the provision in the former act must be construed with the one in this, and if not repealed by it, which we can not doubt, it must give place to it.

There is reason for permitting executors and administrators who have given bond as such in this state, to appeal without other security. They are under the control of our courts; they can at any time be required to give additional security; they can be cited in to show cause why they should not settle the estate, and can be compelled by an action on their bonds, within our own jurisdiction, to do right and justice to all concerned. If they reside out of the state, they are beyond our control, and we can not think it was the design of the legislature to permit them to carry on controversies in our courts, without giving an appeal bond. The same question has been twice decided on the circuit, the present season, and all the members of this court now present have united in this opinion. The motion to dismiss the appeal is sustained.

BENNER'S LESSEE v. PLATTER AND OTHERS.

A call in a survey, for a stream not navigable, is a call for the main branch of such stream, and the boundary is the middle of the stream.

THIS cause was adjourned from Ross county. It came before the court upon a motion for a new trial. The material facts of the case are as follows.

On the trial the plaintiff gave in evidence:

505] *1. A survey made for Miles King, on November 3, 1793, for one thousand acres, beginning on the upper side of Paint creek, at two elms and two sycamores on the bank of the creek, thence up the creek (several corners and distances), passing the mouth of Buckskin, to a corner.

2. A survey made for Richard Taylor, on November 10, 1793, for one thousand acres, beginning at a sycamore on the upper side of the mouth of a branch where Todd's trace crosses, thence up the creek and binding thereon, crossing Todd's trace (several southwesterly corners), to the lower end of an island, and thence (several southwesterly corners) to a hackberry, Spanish oak, and red bud, thence from the creek, etc.

The figure of these surveys, as represented in the returned plat

made at the time, bounds Taylor northwardly by the creek, and King southwardly by the creek. Neither represents any island. The survey of Taylor extends upon the creek, about one-half the length of King's line on the creek. A line run according to the corners and distances called for in Taylor's survey next the creek, would run pretty near the creek, and pass what is now described to be an island, near the intersection of the channel, making the island on to the island; crosses it with two corners, leaving about two-thirds of the island between the line and the main channel of the creek, then crosses on to the main-land, and runs thence into the fields away from the creek, and the acknowledged line of the survey.

The plaintiff's patent was dated in 1815, and predicated upon a fireside survey, made in 1814, having for object the island as it is called, and the bed of the creek between King's and Taylor's survey. The only line actually run in this survey was across the creek, from King's upper corner to a spot near the lower point of the island. The patent covers whatever vacant land there was between King's and Taylor's survey. Paint creek is not navigable. At low water little, and at some times there is not any water flowing in the bayou or channel around what is called the island. In a middle stage of water, nine-tenths of it flows in the other or main channel. The jury found for the defendants, subject to the opinion of the court on the law reserved, as to the true construction of the boundary of Taylor's survey upon the creek, and if, in the opinion of the court, the plaintiff's patent covers any portion *of the [506 land in controversy, then the verdict is to be set aside and a new trial granted, otherwise judgment is to be entered on the verdict.

B. G. Leonard and T. Scott, for the plaintiffs, contended:

1. Taylor's survey calls for the lower side of Paint creek, and was made in 1793. The evidence to show the existence of an island reaches no further back than 1797. At that time the water flowed through the channel around the island, next to Taylor's land, except in very low stages of the water; and the island now contains fifty or sixty acres. This shows that it was an island in 1793. It belongs to the court to determine what an island is, when the facts relating to it are established. It is for the court to construe the survey as other written instruments, when the matters in *pais* connected with it are found. The question then is, whether within

the true construction of Taylor's survey, bounding on the creek, an island, surrounded by the creek, is included within it. The survey describes land on the lower side of the creek, and calls for the lower end of an island, on one of the lines along the creek. Can it be extended to embrace the island in the survey? It will be an extravagant solecism to assert that a call for the lower side of a stream includes an island within the stream. An island must lie within the stream; it can not lie on either of its sides. It would be inadmissible to give proprietors of one of the shores of the Maumee or Sandusky rivers an island of five hundred or one thousand acres within their beds. A call for a creek, and down the creek with the meanders binding thereon, conveys no right to the channel or bed of the creek, nor makes the creek the boundary. Hughes, 55; 1 Bibb, 56, 58, 72, 95–97, 101; 2 Bibb, 356, 626; 3 Bibb, 144, 145, 205, 415; Angel, on Tide Waters, 18–23, 58; Harg. Tracts, 5; Holt, 499; Hardin, 258; 4 Pick. 269; 17 Mass. 289; 5 Wheat. 374.

The survey and patent to Taylor only covers lands on the lower side of the creek, and is bounded by the courses and distances called for.

2. King's survey is bounded, on the upper side of Paint creek, by the courses and distances called for.

3. The land lying between these surveys was unappropriated 507] *except by the survey and patent to the plaintiff's lessor, and is vested in him.

4. The act of Virginia of 1779, "for establishing a land office, and ascertaining the manner of granting waste and unappropriated lands," made the beds and banks of streams subject to grant to individuals as other lands, and remains in force to this day as it regards western lands.

5. If the act of Congress of 1796 (2 Sto. U. S. L. 425), declaring the beds and streams of unnavigable rivers to belong to the owners of the opposite banks in common, has application to the case before the court; it establishes the plaintiff's right to recover under King's survey, because the defendant claims the exclusive use, and has ejected the plaintiff of his use of the moiety.

W. S. Murphy and R. Douglas, for the defendants, insisted that the calls of Taylor's entry and survey are for the creek, which forms the northwestern boundary of his land, and includes the island.

The patent upon that survey conveys the land to the center of the creek and includes the island. They cited the following cases: 20 Johns. 90; 17 Johns. 195; 2 Caine, 319; 3 Kent's Com. 344, 345, 353; 2 Conn. 481; 7 Mass. 496; 4 Pick. 268; 2 Bin. 475; 3 Rand. 33.

G. SWAN, on the same side.

Judge WRIGHT delivered the opinion of the court:

If, in legal contemplation, the main branch of Paint creek to its center or channel is the boundary of Taylor's survey, the plaintiff has no title; but if the creek described was the ravine, or the inner side of what is called the island, then the plaintiff has a legal title to the island.

As we understand Taylor's survey, the creek is its boundary, It begins on the upper side of the mouth of a branch, thence up the creek bounding thereon. It is difficult for us to understand how any one can dispute the proposition that such description makes the creek the boundary. We entertain no doubt it is the legal boundary in this case. A boundary on a stream like Paint creek, not navigable, is a call for the channel or middle of the creek. A call for Paint creek is a call for the main stream, not a mere branch of the creek. Whether the *tract claimed as [508 an island be one, that is, land permanently surrounded by water, or a peninsula, sometimes insulated by water flowing through a ravine, or into a bayou, makes no difference. The boundary being the main channel or center of the creek, islands, properly so called, will belong to the proprietor of that side of the channel where the island is found. This disembarrasses the case of the inquiry, whether the creek is an island or not. The main branch of Paint creek is between the ground called an island and King's survey, not between the island and the main land of Taylor's survey.

King's survey covered the land on the upper side of the creek to its channel. Taylor took the other side to the same channel. As the same line bounded the opposite proprietors, there could be no unappropriated land which Benner had a right to survey and appropriate to himself; therefore the survey and patent to him convey nothing.

The case of McCulloch's Lessee v. Aten, 2 Ohio, 309, has been

examined. In that case, the court were called upon to establish for the defendant a boundary on the bank of a creek not navigable. The boundary described in the deed, as the court state it, was down the creek, with the several meanders thereof. The court say, we understand it to be a settled rule, whenever the stream is made the boundary, it is the water, and not the *center* of its channel that is referred to. So far is very well. The court then commented upon the case in 5 Wheat. 374, involving the southern boundary of the state, the Ohio river, as sustaining their opinion. That decision established low-water mark as the boundary, not the bank. The Ohio is a navigable river; it is moreover the boundary of state jurisdiction and sovereignty, and could only be a proper boundary for such purpose, while each state was limited to its own side of the water, because the jurisdiction of each in its very nature is exclusive of all others. Virginia, being the original proprietor of both banks of the Ohio, granted to the United States all lands lying northwest of that river. This was held to convey only to low-water mark. If Virginia had not been the original proprietor of both banks of the river, and it was the common boundary, the line would be the center, and the islands go with the adjoining main-land on that side of the channel where they lie. The opinion of the court, in the first case, goes on to de-
509] clare the meanders of the creek (a *stream not navigable) to mean the water's edge at low water. It seems to us this expression was used inadvertently, without regard to the difference between a navigable river and a stream not navigable. Establishing the water's edge as the boundary, instead of the channel, gave to the plaintiff, in the case before the court, all he sought for in that case, a salt well. The land lying between the edge of the water and the channel was not in contest. We do not think the court intended to decide that a boundary upon an unnavigable stream called only to the edge of low water.

We are strengthened in this belief by a later case decided in bank, Gavit *v.* Chambers and Coates, 3 Ohio, 496, where the rights of a grantee bounded on the Sandusky river, a stream by the court regarded as navigable, were settled. The opinion of the court in that case examined the doctrine of boundaries upon such streams. The court holds all grants by the United States upon such waters to be subject to the rule of the common law, which, in such cases, is the plain rule of common sense. It is, say the

court, that "he who owns the land upon both banks owns the entire river, subject to the easement of navigation; and he who owns the land upon one bank only owns to the middle of the river, subject to the same easement." This is the rule recognized not only in England but in our sister states. 20 Johns. 90; 17 Johns. 195; 3 Caine, 319; 3 Kent C. 344, 345; 7 Mass. 496; 4 Pick. 268; 2 Bin. 475; 4 Pick. 268; 2 Conn. 481. At common law the beds of all rivers, not subject to the ebb and flow of the tides, are held the property of the owners of the adjoining banks.

Section 9 of the act of Congress for the disposition of the United States lands in the Northwest territory is pressed upon our consideration as settling the question in this case, and making the bed of the river common to proprietors bounding on the river. In the case of Gavit *v.* Chambers and Coates, the court held that provision "confined to reserving the use of navigable rivers, and to declaring the existence of the common law doctrine in respect to streams not navigable," making the right to the soil in unnavigable rivers individual property to the middle of the stream, and the use of the stream common to them. But the act is not supposed to bear upon the case before the court, because by its express terms its provisions are limited to lands to be disposed of by the act. The lands lying between the Scioto and Little Miami rivers are not disposed of by *the law, but were reserved [510 before its passage to satisfy Virginia military warrants.

I have examined with some care a number of authorities pressed upon the court by the counsel for the defendant with unusual earnestness and pertinacity. I am unable to elicit from the decisions any principle at all conflicting with any point decided by this court at the trial or maintained now. There are many things connected with the adjustment of settlement, rights, and entries, connected with the improvements of the locator, the figure, the surveys, and the general convenience of the country that have no application, except to countries and rights similarly situated. There, as here, however, where there are several calls in the deed or survey which conflict with each other, that one yields to the others which is least essentially to affect the general object of the survey, the certain description of a tract of land. Upon that principle it was decided, in 3 Bibb, 205, that when it is apparent that the description binding on the creek forms no part of the boundary, as particularly described in the deed, and can

not be conformed to by complying with the express calls of boundary, it seems pretty clear that it should be considered as yielding to the more special specification of boundary, and under such circumstances a line binding on the creek might leave its meanders, and be run straight, in order to give effect to a survey and grant. In the case before us we think the creek is clearly the boundary of the survey, and there is no necessity in the case pressing it to yield to anything more or less certain.

The law on the point reserved is with the defendant, and the verdict and judgment will be entered accordingly

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REDDISH'S EXECUTORS *v.* WATSON, HOLCOMB, AND OTHERS.

Joint note stipulating that it may be continued from time to time, upon payment of interest, binds all parties, though part were securities, and the continuance had without consultation with them.

Contract to pay five hundred dollars, with fifteen dollars interest in advance every thirty days is valid, and the interest paid on the contract, in advance, can not be held as part payment of the principal. The failure to pay such interest in advance puts an end to the contract, from which time six per cent. only is recoverable.

THIS cause was adjourned from the county of Hamilton. It was assumpsit on a note in the following words:

511] *"CINCINNATI, *December* 22, 1828.

"Thirty days after date, we, or either of us, promise to pay Thomas Reddish, or order, five hundred dollars for value received. Also, we, or either of us, promise to pay the said Thomas Reddish, or order, fifteen dollars each and every thirty days, for the use or interest of the above sum of five hundred dollars, the said interest to be paid each thirty days in advance, until this note is paid.

"Value received. THOMAS WATSON,
P. J. HOLCOMB,
C. B. & H. L. HOLCOMB."

On the back of this note was indorsed: "Received, January 24, of P. J. Holcomb, one hundred and four dollars, on account of

principal, which pays the same to February 21, 1829. Balance due three hundred and ninety-six dollars. T. REDDISH."

The writ was returned served upon the Holcombs, but as to Watson, not found. Two issues were joined with the defendants served with process: 1. On *non assumpsit*. 2. The second issue presents two propositions by the defendants: 1. That Watson signed the note as principal, and the Holcombs as securities. 2. That Reddish, after the note fell due, by agreement with Watson, and without the knowledge or consent of the Holcombs, gave him further time to pay the note, for thirty days beyond February 21, 1829. On trial, the note was given in evidence to the jury, with the indorsement and the following receipt:

"Received of P. J. Holcomb one hundred and sixteen dollars twenty-four cents, on account of Thomas Watson's note, and interest due the 22d inst. T. REDDISH.

"*January* 24, 1829."

Other evidence was given to the jury, as to the fact of the relation of the principal and security between the signers of the note. The judge trying the cause, in charging the jury as to the construction of the note, said:

"As we understand the import of the note, it contains on its face an agreement by all the parties, that the payee may postpone the day of payment from time to time, for periods of *thirty days each, on receiving the interest for such ex- [512 tended time in advance. This is the legal construction of the instrument, and it authorized such time to be given, at least, until notice by the parties that no further time should be given. Therefore, if you have no evidence of such notice (and I have heard none), you must find the second issue for the plaintiffs; but if you have such evidence, you will regard it and find accordingly."

The jury under the advice of the court, and by agreement of counsel, returned a special verdict, finding the issues for the plaintiffs, referring the law fixing the rate of interest to the court, assessing the plaintiff's damages at eleven hundred and thirty-six dollars and fifty-two cents, if by law the plaintiffs can recover interest at the rate of fifteen dollars for each and every thirty days; or at five hundred and nineteen dollars and forty-two cents, if they were only entitled to interest at six per cent. per annum. The defendants move for a new trial, on the ground that the court mis-

directed the jury as to the construction of the note. The plaintiffs resist this motion, and move for a judgment for the highest damages assessed by the jury. Two cases at law, of Lodge v. Wood and Hodgson, on notes drawing interest at twelve per cent. per annum, payable monthly, and a bill in equity, Bacon v. Benham, upon a mortgage to secure the payment of a loan at twelve per cent. per annum, were argued upon the construction of the statute fixing the rate of interest, and considered with the case of Reddish v. Watson et al.

N. WRIGHT, for the plaintiffs.

V. WORTHINGTON, for Benham.

C. FOX, for the defendants.

S. FALES, for the plaintiffs.

W. M. CORRY, for Lodge.

Judge WRIGHT delivered the opinion of the court:

We are unanimous in the opinion there is no error in the construction of the contract as to the giving time to pay, which the court gave to the jury. All the parties to the note, whether principal or securities, stipulate in it, that it may be continued from time to time, thirty days at a time, by paying the interest for such 513] time in advance. Without proof that this stipulation *was put an end to, it continued to operate, and was the written consent of all for extending the time for paying the note. The motion for a new trial is therefore overruled.

It is conceded in the argument by the counsel for the defendants, that the right of interest results from statute regulation entirely. Such we understand to be the law. 7 Bac. Abr. 188; 6 Johns. 284. Independent of the statute, any person has the same right to contract for ten per cent. interest that he has the principal sum. 1 Ohio, 239. In Brockway v. Clark, 6 Ohio, 50, this court had the act of 1824, fixing the rate of interest under consideration, and, I thought, then settled this construction. I do not now see how that case, which met the approbation of the whole court, could have been decided as it was, without a construction

of the act of 1824, although there is not the same unanimity among us now that there was then. In that case it is said, that until the year 1824, we had a statute fixing the rate of interest at six per cent. per annum, and providing punishment for usury. The general assembly, in 1824, repealed the law against usury, and enacted in its stead the present law, fixing the rate of interest upon all moneys, after the same shall become due, at the rate of six per cent. per annum, and no more. 29 Ohio L. 151. It is contended for the complainant, that the only change effected in the interest law by this last act is one of phraseology, the substantial enactments of each being the same. We do not think so. The two acts differ in very essential particulars. In the former, any person demanding or receiving more than six per cent. per annum, on any contract, debt, or demand whatever, forfeited the whole amount of debt on which such illegal interest was charged or received, one-half to the county, and the other to the person prosecuting. See act of 1804, 1 Chase's Ohio L. 484.

The act of 1824 contains no provision for forfeiting the debt, nor any penalty on contracting for, or receiving any rate of interest. The first was entitled "an act fixing the rate of interest, and for preventing usury," the last simply an act fixing the rate of interest. These differences clearly indicate that the assembly, in the two enactments, had not the same object in view. The language of the act of 1824 is, "all creditors shall be entitled to receive interest on all money after the same shall become due, either on bond, bill, promissory note, or other instrument of writing, or contract for money or property; all balances due on settlement between parties thereto, or money withheld by *unreasonable [514 delay of date; and on all decrees obtained in the court of chancery for the payment of money, from the day specified in said decree for the payment thereof, or if no day be specified, then from the day of entering thereof, until such debt, money, or property is paid, at the rate of six per cent. per annum, and no more. It is urged, in behalf of the defendants, that this is an exact copy of part of the first section of the act of 1804, and must receive the same construction as did that act in Smith v. Parsons, 1 Ohio, 236. The case referred to was one arising under the insolvent law of Maryland, and involved the validity of a discharge in that state, to exonerate the insolvent from the liabilities, when afterward domiciliated in Ohio. Neither the construction of our interest law,

nor that of any other state, was embraced in the inquiry. The highly respectable judge, who drew up the opinions in that case, in his hypothetical reasonings in support of the constitutional right of a state to discharge insolvent debtors from liability upon contracts, notwithstanding the prohibitions against them impairing the obligation of contracts, says, page 239, "The state may, for instance, pass laws preventing usury, and fixing the interest of money. Should such a law enact, that a lender may receive from the borrower six per cent. interest or more, and should an after contract contain an express promise to pay ten per cent., such a contract, although voluntarily made for the payment of a specific sum, would be void in part, and in many of the states the obligation would be entirely destroyed, and the obligor released from the payment of both principal and interest. Independent of the statute law, every person has the same right to contract for ten per cent. interest, that he has for the principal sum," etc. The judge in this course of reasoning had no idea himself that he was expressing his own, or the construction of the court upon the interest laws of 1804. If it be admitted that the opinion quoted expressed the received construction of the act in question, taking the whole of that law into consideration as one enactment, it would be difficult to maintain the proposition that the construction of the section under consideration, when forming a part only of a law, would furnish a rule for construing another law, in which that formed the sole provision. The construction of a law would hardly be tolerated which selected one part, and judged of it without reference to the other parts. It is a well-known rule in construing statutes, that you must look to the whole law, in order
515] *that the intention of the law-giver may be carried into effect, if it can be done without a palpable violation of the import of the language used. If you strike out of the clause of the act under examination the clauses inapplicable to notes, it would read as follows: "Creditors shall be entitled to receive interest on moneys due by promissory notes, after the same shall become due, at the rate of six per cent. per annum, and no more." It is contended that this provision prohibits the receipt of more than six per cent. per annum for money, before the time stipulated for the payment has expired, and before it has become due. The act does not purport to prescribe the rate of interest for money before the same shall fall due. It speaks only of interest to be allowed after

the same shall become due. As to all other questions about interest the law is silent. "Independent of the statute law (says the judge in the case of Smith *v.* Parsons, 1 Ohio, 239, cited by defendants), every person has the same right to contract for ten per cent. interest that he has for the payment of the principal sum." The counsel for the defendants admit it to be well settled that there is no such thing known to the common law as a right to interest.

If, then, without statutory prohibition, parties may as lawfully contract for ten per cent. interest as for the payment of the principal; if there is no prohibition in the act against recovering more than six per cent. before the money becomes due, and the defendants' arguments admit that the law does not prohibit the contracting for a higher interest than six per cent. per annum, nor make it illegal to receive a higher rate—the authority of a court of law to set aside the rule of damages settled and agreed on by the parties themselves and to substitute another, must be denied. There is in the act before us neither prohibition to the agreement, nor forfeiture, nor penalty. The contract sued on is valid at common law, and not prohibited by statute. It furnishes a rule of damages for witholding the payment of the plaintiffs' money, lawfully adjusted by themselves; yet we are asked to reject it, and say to the borrowers, "It was lawful for you so to contract, if you please, and to pay according to contract if you please. There is no law against the contract, or against your complying with it; but if, when you have got the money on the contract, and received all the advantages you were to have by its terms, you will refuse to pay as you agreed, and submit to be sued, you shall only be required to pay a part of what *you agreed, [516 the rest shall be given you as a premium for violating your solemn agreement." It seems to me a new species of legal morality to award premiums to induce the violation of legal contracts. The injunction is no longer to hold good to settle with your adversary, whilst you are in the way with him, least he hand you to the judge. It is to be, refuse to settle, forbear to do what you have agreed, and you shall be rewarded. I should hesitate long before I would sanction such a rule. A statute prohibiting agreements for interest higher than the prescribed rate upon contracts made under it, would act upon the contract. It is an admitted principle that contracts made in violation of law are void. If our laws prohibited agreement for more than six per cent. interest, a note for more would be void.

It could not on that account be enforced in a court of justice. That is not the case at bar. On the contrary, a law like ours, prescribing a rate of interest where money due is withheld, and the parties have omitted to fix the rate in their contract furnishes no rule for the contract, it merely supplies the rule of compensation in cases where the parties have omitted to agree upon one, as a punishment for the unreasonable and vexatious delay of payment. Interest is the creature of statutes. None was known to the common law; unless there was a special agreement, no damages could be recovered of a man for withholding the payment of money after it was due. Lord Mansfield, in Robinson *v.* Bland, 2 Burr. 1086, holds a suit to recover money and interest "really and effectually brought for a specific performance of a contract." As in law you can not decree that performance specifically, damages are assessed in amount equal to the sum withheld. If this be correct, and a majority of the court think it is, the rule should be applied to the case before us. We think the legislature had some object in view, in changing the law of 1804, as we said in Brockway *v.* Clark, 6 Ohio, 50. Indeed, it would be difficult to escape that conclusion. The omission in the act of 1824, of all the penalties and prohibitions of the law repealed, and the change of title to make it conform to the altered law, evince some design. What the design was, is the question. A majority of the court is of the opinion the design was to leave parties free to contract for the hire or interest of money, as for the hire or use of anything else, and 517] the contracts themselves *to be enforced in the courts of justice on common law principles. Supplying a legal rule of damage for the use of money for all periods not provided for by the contract of the parties, and for cases of implied liabilities for money or property withheld, where the common received principles are wrong, the legislature now in session can readily supply the defects of the present law by another enactment, expressed in language so clear and explicit as to admit of but one construction.

This court, in Watkinsen *v.* Root, 4 Ohio, 373, had the act of 1824 under consideration. The contract in that case was to pay a certain sum in installments, with lawful interest, to be computed and paid annually. The suit was brought to recover the arrears of interest, and the only question was whether interest was allowable upon the successive annual charges of interest after they fell due. The court thought the contract prohibited by no statutory

provisions, and saw no reason why it should not be enforced. Interest upon interest was there allowed by the court, and the plaintiff recovered accordingly more than at the rate of six per cent. per annum. This decision seems to regard the interest law as we do. The contract here is to forbear the collection of the five hundred dollars, the principal sum, from time to time, for thirty days each time, upon condition the borrower paid fifteen dollars on the first of each thirty days, as they should occur. Without the payment in advance, the contract to delay enforcing payment of the principal sum was at an end. The neglect to pay the interest signified the will of the defendants to put an end to the stipulation on their part. The parties have not contracted for any rate of interest, unless to be paid in advance. None other, therefore, can be recovered in this suit than the six per cent. per annum provided by law for moneys after the same are due. The plaintiff is entitled to judgment for the balance of the principal sum, with six per cent. per annum interest, from February 21, 1829.

Judge LANE dissented.

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*DOWS AND CAREY *v.* HARPER AND PAINE. [518

Writ of error *coram nobis* allowed in a proper case, such as death of party before judgment.

FROM Ashtabula. Application for a writ of error.

GRISWOLD and SAWTELL, for the applicants, exhibited to the court the record of a judgment of the Supreme Court in Ashtabula county, at August term, 1833, in favor of Harper and Paine *v.* Dows and Carey, assigned for error the death of Paine before the judgment, and prayed for a writ of error *coram nobis resident.*

They argued that "section 3 of the act organizing judicial courts, 29 Ohio L. 56, authorizes this court, on good cause shown, to issue writs of error, and all other writs not specially provided for by statute, which may be necessary to the due administration

of right and justice throughout the state, and for the exercise of its jurisdiction agreeably to the usages and principles of law."

This statute is supposed to confer upon this court a plenary power to redress the party injured by error in a judicial proceeding, if the usages and principles of law furnish any remedy. No principle of law is better established, and no principle of right and justice is sooner admitted than that a defendant in an erroneous judgment is entitled to a reversal, except, perhaps, for error in law in the court of *dernier resort*. In cases not specially provided for by statute, the legislature points us to the common law, and if a remedy is there found, this court will adopt and administer it.

In the matter of James Turner, 5 Ohio, 542, on motion for *mandamus*, this court, after reciting the above-recited statute, say that "the occasions upon which the writ is to issue are not pointed out, and it is necessary to recur to the principles of the common law to see in what cases it is properly applicable."

If, then, the writ of error *coram nobis* is in use for correction of error in fact in analogous courts of common law, this court will allow it.

The writ of error *coram nobis resident* is familiar to and in ordinary use in the *banco regis* and in the common bench, and demandable in all cases *ex debito justitiæ* except treason and felony. 2 Salk. 504; 3 Salk. 147; 2 Salk. 144. Error in fact is not the 519] error of the judges, and therefore reversing it is *not reversing their own judgment. 1 Roll. Abr. 747; Cro. Eliz. 105.

From the cases in the elementary books, the following principles appear to be fully established as the law of English courts:

1. That in the *dernier resort* error *coram nobis* will not lie—not for error in law, for it would be unseemly for the judges to sit for reversal of their own judgment once solemnly pronounced—not for errors in fact, for it is beneath the dignity of the house of peers to examine matters of fact.

2. That in the king's bench and in the common pleas *coram nobis* will lie for correction of errors of fact, for reversing error in fact by the judges is not reversing their own judgment; but for error in law it will not lie, as the judges will not reverse their own judgment, and there is a higher tribunal in which the subject may have his redress.

If, then, this case is to be governed by the law recognized in

English courts, upon what grounds shall the application be refused?

Shall it be said that this is the court of last resort to the citizens of this state, and that in the present case the writ can not issue, for the same reason that it would be denied in the *dernier resort* of the English court, to wit, the apprehension of a sacrifice of dignity? Will this court be influenced by such a reason? We apprehend not. Good reasons there may be against this court's sitting for correction of its own judgments for error in law.

Though a court of the last resort, the Supreme Court of Ohio, in its powers and practice, has a much stronger affinity, and is more analogous to the court of king's bench than to the house of peers.

The same necessity exists for the action of this court in this and in like cases as in king's bench—that it is the only means of redressing the wrong—and no code of law, it is contended, will be violated. The reasons which banish that writ from the house of peers do not exist here. Without the reasons assigned, that court must have entertained it; and in the absence of the same reason it is believed this court will allow it, for "*cessat ratio, cessat lex.*"

The true dignity of this court is based upon its efficiency to administer right and justice, and to redress the wrongs of the citizens. It is ever conversant with matters of fact, and *though [520 by the constitution and law the highest judicial tribunal of the state, by its original and appellant jurisdiction, takes cognizance of by far the most important and numerous of litigated facts.

No reported decision of this court is found directly settling the question of this application, yet we can not suppose it novel.

In Stiver *v.* Stiver, 3 Ohio, 19, though the same point was not then in issue, the court intimate an opinion favorable to this application.

Death of plaintiff or defendant before judgment is good assignment for error. 2 Saund. 101.

By our statute, suit does not abate by death of joint plaintiff or defendant, but on suggestion of the death on the record the cause shall proceed.

We contend that judgment after the death, without the suggestion on the record, is erroneous.

Judge WRIGHT delivered the opinion of the court:

The single question raised upon the application before us is, whether a writ of error will lie to examine into an error in fact, *dehors* the record in a judgment of the Supreme Court? No practice on the question is known to us, this being the first application within our knowledge, though tradition advises us that the writ has, in times past, been both allowed and refused.

In England, errors in fact are corrected in the common pleas during the judgment term, without writ. After the close of the term such errors are examined into upon writ of error in the king's bench. 1 Burr. 410; 2 Saund. 101, *a.*, n. 1, and 308. The writ of error *coram nobis* is not within the statute of 27 Eliz., allowing writs of error from the exchequer to the king's bench; and such writ is held not to lie to the house of lords, because it is inconsistent with the dignity of that court to take cognizance of facts. It has, after great argument, been decided that the king's bench could reverse its own judgment on a writ of error. 3 Salk. 145; 2 Leon, 74; Cro. Eliz. 106; Yelv. 157. It is now held, that for errors in fact in the king's bench, its judgments may be reversed in the same court by writ of error *coram nobis resident*, F. N. B. 21 (49); 1 Strange, 127; as otherwise the erroneous proceeding could not be reached.

521] *If the necessity for a writ of error to the king's bench in the state of things in England was a good reason for the use of the writ there, the same reason exists in this state. The Supreme Court being our highest judicial tribunal, no other court can examine its proceedings; and if the writ of error *coram nobis resident* is refused in our practice, wrongs resulting from the errors in fact of this court would remain without redress.

The Supreme Court in New York has adopted the like practice. 11 Johns. 460.

The writ is allowed, returnable to the next term.

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WILLIAM HEADLEY, PLAINTIFF IN ERROR, *v.* WILLIAM ROBY, DEFENDANT IN ERROR.

Court may order special bail after action brought upon sufficient cause being shown.

Debt, upon record of judgment for money, sustainable.

Joinder to demurrer "in short" insufficient.

It is error for the court to decide the facts of a cause, when no issue is made.

RESERVED, on the last circuit, in the county of Scioto, for decision in bank.

WOOD, J., stated the case and delivered the opinion of the court:

The facts are these: In 1832 the defendant sued out of the office of the clerk of the common pleas of Scioto county a summons against the plaintiff in an action of debt. At the return term of the writ, the sheriff having indorsed it "served," the court ordered the plaintiff, on motion of the defendant, to put in special bail. The plaintiff, not complying with this order, was committed.

To obtain the order for special bail, the defendant exhibited to the said court the exemplification of the record of a judgment of the common pleas of Pike county in favor of the defendant, against the plaintiff for five hundred and seventy-two dollars, rendered on September 21, 1825, and no other evidence of indebtedness. The counsel for the plaintiff resisted the making of the order, on the ground that no affidavit of indebtedness was made by the defendant in error, and took a bill of exceptions to the opinion of the court in sustaining the motion for special bail, and which decision is assigned for error.

The defendant in error then filed his declaration in debt on the same judgment, and to which the plaintiff demurred specially, *and set down for cause of demurrer: 1. That the judg- [522
ment on which the action was brought was rendered in the county of Pike, and within the judicial circuit in which the action was commenced; and it did not appear, by the declaration, but that execution might well issue on the same. 2. Because it would be oppressive, and contrary to the policy of the law, to suffer the defendant in error to have one judgment on another in such case, creating unnecessary evils and litigation. 3. Because it is not

averred, in said declaration, that said judgment, on which suit was brought, was dead in law, so that no execution could issue thereon.

To this demurrer the defendant in error filed his rejoinder in error in these words: "*joinder in short*," etc. The court of common pleas overruled the demurrer, which decision is also assigned for error.

On overruling the demurrer, the court gave the plaintiff in error leave to plead. The plaintiff in error then filed a plea of payment to the declaration and a notice of set-off.

The cause was afterward submitted to the court by counsel, and judgment without any replication to the plea of payment was rendered for the defendant in error, and without passing on the plea of payment, which decision and proceedings of the court in rendering the said judgment is assigned for error.

We will take up the several points made, in their order:

1. Had the court of common pleas the power to order special bail to be filed by the plaintiff in error, on the production of the record of the judgment, without the affidavit of the defendant in error?

This depends entirely on section 6 of the act regulating the practice of the judicial courts, which provides "that the plaintiff shall be entitled to have special bail, in all actions brought on any covenant, bond, sealed bill, promissory note, due bill, bill of exchange, or article of agreement for the payment of any sum of money certain; and in all actions brought on other contracts, by which the sum due or damages sustained shall appear to be uncertain, but which the plaintiff or his agent shall swear, by affidavit to be filed in the cause, are not less than one hundred dollars; and the plaintiff shall have special bail in all other cases in which the court in term time, or any judge thereof in vacation, shall, from the particular circumstances, order such bail to be given. If special bail be allowable, as a matter of course, on the several in-
523] struments *above specified, and we were to reason from analogy, it would not require any very great latitude of construction to extend the statute to a judgment, as an obligation or contract, on which the party would be entitled to special bail without order or affidavit.

It is, however, probably not within its meaning; for, although it is a contract of the highest nature, by which the rights of the parties are definitely settled, and no longer open to litigation, it is

not of the description of contracts pointed out in this section of the statute, but was left out unquestionably by unintentional omission. A judgment is not within that description of contracts enumerated, when the plaintiff will be entitled to special bail by making an affidavit, because there neither the debt nor damages are uncertain. It is, however, embraced in this provision: "And in all other cases in which the court in term time, or a judge in vacation, shall, from the particular circumstances of the case, order such bail to be given." Here the case is embraced. Is there any law requiring an affidavit to be presented to the judge, before he can order bail. The conscience of the court must be informed. The court may have personal knowledge of the circumstances; they may be convinced, from the examination of the evidence of the plaintiff's claim, from the statements of counsel, or otherwise, and exercise their discretion in an order for bail. Such is, doubtless, the meaning of the broad provisions of this section of the statute, and has been the practice of the common pleas and the Supreme Court for many years. The common pleas, then, did not err in making the order for bail upon the evidence which the record furnished of indebtedness. On motion for bail the plaintiff may disclose the circumstances by affidavit or otherwise. Wilcox, Forms, 12.

We then come to the demurrer to the declaration, and the causes assigned, and they may all be disposed of at the same time. It is one of the first principles we learn in relation to the action of debt, that it may be sustained on a record of a judgment, and when the judgment is obtained, and the record made up, the right of action is complete. It may be brought, not only on the judgments of our own courts, but those of our sister states. The right to issue execution on a judgment is a remedy cumulatory only; and I know of no law which would deny to the party a right of action on a judgment, if he chose that remedy, because he could issue an execution.

*This opinion reaches all the points made by the demurrer. The court did not err in overruling it. [524

The joinder to this demurrer is "*in short*," and shows that the practice of *prairie pleading* is more extensive than may have been imagined. It an objection had been taken to this joinder, "*in short*," under the authority of a case which was disposed of by a late distinguished judge of this court, it would have been stricken

from the files, "*in short*," at the costs of the plaintiff below. It would require but a moment more time, and a few more words, to have placed a formal joinder on the record, and we intend to censure, at least, a practice so loose, and which must, if permitted, render the records of our courts a source of ridicule. It was once said by a learned judge that infinite mischief accrued by the facility of courts in overlooking errors of form; that it encouraged carelessness, and placed ignorance too much on a footing with knowledge, among those who practiced the drawing of pleadings. Precedent is safe, and should not be departed from without sufficient cause by those who practice the science of the law. This joinder, *in short*, is assigned for error, but it is unnecessary further to notice it, as the remaining point is decisive of the case. 2 Ohio, 253.

The cause was submitted to the court, in the place of the jury, to pass upon the issues made up, or which should, more properly speaking, have been made up between the parties. The court found the debt in the record, declared on for the plaintiff, but omitted to take any notice of the special plea of payment. If the court below considered an issue made up on the plea, they have not responded to it, which omission is error. If they did not consider the issue made, it was error to dispose of the case while the plea remained on record as a part of the case, although without a replication. In either case it is error. 5 Ohio, 277, in part.

The want of a replication is carrying still farther, we suppose, the "*prairie practice*." It is a replication in short, so short that, in short, there is nothing of it.

Judgment reversed—remanded—to be reinstated and proceeded in, in common pleas, as that court may be advised.

525] *ASA MAYO *v.* CHARLES T. BOSSON AND OTHERS.

Values fixed upon stock brought into a firm and conducted for a time, not to be readjusted in equity without proof of fraud.

Errors in calculation, or in stating the account upon settlement, may be corrected.

THIS cause was brought to the court in bank for decision from the county of Miami. It was a bill in chancery, filed to open the settlement of a partnership account and readjust its several items. The bill charges many specific errors and to a large amount, alleging that these errors are of a character necessarily involving the practice of fraud. The answers deny all fraudulent intent, and deny also the existence of the alleged errors in the settlement. The material facts in the case are these:

In February, 1828, the complainant and Wm. Bosson were engaged in mercantile business as partners, having an establishment at Cincinnati and another at Troy. Charles T. Bosson and Joseph Bosson, the other defendants, owned certain real estate near Troy, consisting of mills and water power, and a manufactory for spinning cotton near Dayton. On February 28, 1828, these four individuals agreed to become partners in the business of merchandising and manufacturing, and settled the terms; but these were not reduced to writing until August 30, 1828. This writing, enumerating the property before described, declares it all belongs to the new company. It then provides "that the amounts of machinery, goods, credits, house, building, etc., etc., belonging as above mentioned, are to be ascertained by reference to the schedules taken at the time that the copartnership contract was agreed and entered upon—the improvements, additions to stock, machinery, etc., being considered as the joint property of the parties, as resulting from said partnership contract."

This schedule, which is part of the case, enumerates the amount of property brought into partnership by each of the concerns, and affixes to each item a price. In respect to the cotton machinery and leasehold property near Dayton, after setting down the items of which it consists, there is added, "the whole of the above is in full operation excepting two throstles, which will be in four to six weeks, which is estimated to be worth at least fourteen thousand dollars."

The contract of partnership contemplated an act of incorporation, but this was never obtained.

*The parties proceeded to the transaction of business as a [526
firm, in which they continued until August, 1830. On August 1, 1830, they agreed to dissolve their partnership, and on the 31st of that month agreed upon a partial distribution of effects and liabilities, "reserving for future negotiation such

points as may involve a difference of opinion, all of which, as they arise, shall be subjects of speedy arbitration." This same contract of dissolution provides, that "difference in opinion concerning the machinery shall be submitted for arbitration on or before the 10th of November next." And on the same day, August 31, 1830, the parties subscribed bonds for submitting the difference of opinion concerning the machinery to arbitration. The bond subscribed by Mayo contains this recital, "whereas, the said Mayo and the said Bossons have been partners in trade, under the firm of Mayo & Bossons, and having dissolved their partnership, and settled all the partnership accounts except in regard to the Montgomery cotton factory; and whereas, a dispute has arisen between the said Mayo and the said Bossons, in reference to the sum or amount for which said cotton factory was brought into the firm, and whether it should be considered in the contribution to the partnership property at the original valuation as per inventory, or be subject to a revaluation."

The cause was brought into the Supreme Court by appeal.

In the court of common pleas the cause was referred to a master commissioner, who made a report readjusting the accounts between the parties, fixing a reduced valuation on the cotton factory and machinery, and making a new disposition of sundry other items. This report was excepted to by both parties for different reasons. A new reference was made, and a new report, in which the whole accounts are reviewed, new values fixed, and new results produced. To this report the respondents excepted, upon account of an error in the disposition of a particular item, and because it disregarded both the settlement of August, 1830, and the contract of partnership of February, 1828, in fixing estimates and valuations.

The testimony of a great number of witnesses was taken to establish valuations of the different descriptions of property, and in relation to the conduct of the parties—some to impeach the credit of others; some with the purpose of proving fraud, in the valuations of the original contract of partnership and in the contract of dissolution and settlement.

527] *Fox and Grosvenor, for complainant.

Schenck and Powers, for defendants.

Judge WRIGHT delivered the opinion of the court: R

Its bearing being upon facts, it could not be understood without voluminous details of the proofs, and is therefore omitted. The decree embodies the points decided, and is as follows:

This cause came on to be heard on the bill, answer, exhibits, reports of master commissioners, exceptions thereto, and the arguments of counsel. Whereupon the court are of opinion that upon the whole proofs in the case there is no ground for impeaching or setting aside the adjustment of values of original stock, as settled and agreed by the parties respectively in their written articles of copartnership of August 31, 1828; nor for impeaching or disturbing the settlement or distribution of the partnership effects as made and entered into on August 13, 1830. But the court are of opinion that, in respect to said settlement, it is competent to correct all errors of addition or subtraction, and also to correct the error, whereby Charles T. Bosson, one of the defendants, twice obtained credit for the same sum, as against the stock brought into the firm by Mayo and Bosson. Whereupon the court do award, order, and decree that the several reports of the master commissioners stating the accounts between the parties be set aside, and that an account be taken in reference only to the items of amount specified in this order and decree; for the taking of which and for such further proceedings as may be necessary to a final decision, this cause is continued until the next term of said court.

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*POLLARD v. KINNER. [528

Mere payment of part of the purchase money of lands, there being no memorandum in writing of an agreement to sell, does not take the case out of the statute of frauds.

THIS cause was adjourned from the county of Pickaway. It was a bill in chancery to enforce a specific performance of a contract to sell lands.

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Judge LANE stated the case and delivered the opinion of the court:

The bill makes the following case: The defendant, Kinner, so-

licited complainant to unite in purchasing of Poultney and another a tract of land situate in the Pickaway Plains—Kinner to purchase the whole tract, and complainant to have eighteen acres at the average price per acre. Kinner purchased at twenty dollars per acre, payable upon terms of credit. There was some obscurity over the vendor's title, and by the agreement no payment was to be made until that was removed. Whilst this was unsettled, Pollard, upon request of Kinner, advanced to him forty dollars, in contemplation of its being ultimately credited as payment on the land. Kinner finally was invested with complete title, and Pollard brought his bill to have a decree for the land upon making payment. The advance of the forty dollars was the only allegation of part execution, and there was no written memorandum of the agreement. The defendant interposed a plea of the statute of frauds.

PER CURIAM. We have settled this point, at this term, in the case of Stites *v.* Keller and Skinner, *ante*, 483. The mere payment of purchase money is not a part execution that takes the case out of the statute. The bill must be dismissed.

OLDS and GREEN, for complainants.

JACOB WHITE *v.* BANK OF THE UNITED STATES AND OTHERS.

Decree of dismissal in the court of common pleas, though pronounced *pro forma*, the parties understanding the cause was to be appealed for preparation and hearing, is final, if the appeal is not consummated

Such defense may be made by answer.

THIS was an original bill brought in the Supreme Court of Hamilton county, and was adjourned here for decision. The 529] *bill set forth a state of facts in relation to a contract of which it claimed a specific performance against the defendants, the Bank of the United States. It then set forth that a previous bill had been filed, in the court of common pleas of Hamilton county, for the same object and upon the same contract. The de-

fendants answered; no replication was filed or testimony taken, but the cause was set for hearing, with an understanding that the bill should be *pro forma* dismissed in the common pleas, and appealed to the Supreme Court for preparation and hearing. It was so dismissed, but complainant not being apprised of the arrangement in season, did not execute an appeal bond. The answer insisted upon this dismissal as final, and the case being decided on that point it is unnecessary to refer to the other points of the case.

HAMMOND, and WALKER and KING, for complainant.

CHASE, for defendants.

Judge WOOD delivered the opinion of the court:

If a decree in chancery is once pronounced in the court of common pleas, it is as conclusive on the rights of the parties as a judgment at law. Since the remedy to review the final decrees of that court by writ of error has been taken away by the act of 1831, the decrees of that court can only be set aside by partition for a rehearing, by bill of review in that court, or avoided on an appeal to this. In all cases within the jurisdiction of that court its proceedings are conclusive, and definitely settle the rights of the parties, unless such proceedings are removed in the manner the law provides. It is an undeniable principle, that where a cause has once been adjudicated by a tribunal of competent jurisdiction, its merits shall not again be disturbed. It is fit, says the law, that there should be an end to litigation; and this rule is as applicable to proceedings in equity as at law. It is well settled that a decree in chancery can not be impeached by an original bill, except on the ground of fraud; nor can it be opened, excepting on a petition to rehear, or a bill of review. 2 Johns. Ch. 205; 4 Johns. Ch. 199. This court have said, 5 Ohio, 460, the position is undoubtedly true that a decree on the merits binds all the parties to it; and in 5 Johns. Ch. 564, the chancellor remarks that there can be no doubt of the settled doctrine that a decree by *con- [530 sent is binding, unless procured by fraud. The complainant in his bill, and the bank in the answer, aver that the bill was filed for the same cause in the common pleas, and the same relief sought which is the object of this bill. The pleadings were made up, the issue closed, and by consent of counsel a decree of dismissal of the

bill pronounced, and notice of an appeal given, which was not perfected. It is laid down in Sugden, that a decree of dismissal, unless qualified by the words "without prejudice," is conclusive on the subject matter laid in the bill. Has there been fraud in the rendition of the decree in the common pleas? It is not pretended, nor does the bill filed in this case seek to avoid it on that ground. It is sought, however, to avoid it, because counsel were negligent, and did not notify the complainant in time for him to put in bail within the thirty days.

This court decided, 4 Ohio, 492, and 6 Ohio, 82, that the mere negligence of counsel would not afford sufficient ground for relief in equity against a judgment at law, and it is well said by counsel, that judgments and decrees by our statute, as it relates to their force, effect, and operation, are placed on the same footing. Can mere negligence of counsel or party, then, be cause for relief here? We think not.

Counsel attempt, however, to avoid this matter set up in the answer as a bar, because such a defense is not made by plea. 5 Ohio, 460, is cited as an authority. The court in that case (Ferguson v. Miller) do hold that language. The bill set up matter in avoidance of a former decree. The defendant demurred, thereby admitting the matter set up. The court overruled the demurrer, said the defense could only be made by plea, and directed the case to stand for answer. I am satisfied from anything there is in the case, that the court did not intend to be understood that such defense could not be made by answer; but only that it was not well made on demurrer. Mitford, in his treatise says, a plea is but a special answer, setting up some matter in bar of the bill. Mit. Pl. 219. We think the defense may be made by answer. Gilston v. Callwire, 1 Johns. Ch. 192, is such a case, and in point.

Our opinion is, that the decree of the common pleas upon the same matters set up here, and when the same relief was sought, is a bar. That decree being by consent, to enable the complainant to appeal, which appeal, not being perfected by the mere negligence 531] of the party, no fraud, no accident, no *mistake set up by which the complainant was deprived of his right of appeal, does not entitle him to any relief against the operation of that decree.

CLINTON WATSON *v.* ISRAEL TRASK.

It is a libel to charge a man with infracting a regularly granted patent for bark mills.

THIS case was adjourned from Geauga county. The plaintiff declares that he was the original inventor, owner, and proprietor of a valuable improved cast-iron bark mill, and for ten years has been engaged in the business of manufacturing and vending said mills for profit, and that the defendant, to injure him and his said business, published of him and of his said business the following libel:

"*Caution.*—The public are cautioned against purchasing, making, or vending the pretended patent right of one Watson to the patent bark mill, he having no right whatever to the same. The original patentees to said bark mill are Edward and John Trask, who have deeded their right to this state to the subscriber, who alone can and will dispose of the right to said mill in Ohio.

"ISRAEL TRASK."

"☞ E. and J. Trask invented and put in operation, in the year 1819 or 1820, a bark mill, and in the year 1821 obtained letters patent for the same. In the year 1822, Clinton Watson, by his own confession, saw and examined one of said mills, and, it is believed, called on the patentees for the purpose of procuring the right of vending the same, which was not granted. Soon after, he commenced selling mills made after this pattern, and still perseveres in his infringement of the right of said Trask, shielded from prosecution by his want of responsibility. I. TRASK."

Issue was joined on not guilty, with a notice in justification that the publication is true. The jury found for the plaintiff.

S. MATHEWS, and R. and P. HITCHCOCK, for the defendant, now move in arrest of judgment, and insist:

1. That the plaintiff can not claim damage for injuring any patent right of his, because it is only alleged, in the declaration, that he was the inventor, not the patentee, and the right of an *in- [532
ventor without patent is no better than that of any other individual.

2. The declaration discloses no title to recover on account of alleged injury to the trade or calling of the defendant, because the declaration only shows the plaintiff's temporary, not permanent, business. 8 Johns. 40.

3. Words spoken of a man's office, profession, or employment, are only actionable where they impeach his skill, knowledge, diligence, integrity, credit, or the quality of the commodity in which he deals. Starkie on Slander, 110, 112, 119.

4. The alleged libel does not question the plaintiff's right to make and vend his improvement in the bark mill; but merely denies his right to make and vend Trask's patent bark mill.

W. L. PERKINS, for the plaintiff insisted, that the publication was libelous and the declaration sufficient. He cited Starkie on Slander, 11, 12, 100, 108–110, 121, 132–137, 140; 6 Bac. Ab. 205; Cro. Eliz. 480; 1 Lev. 115; 3 Mod. 112; T. Jones, 136; 14 Petersd. 187, n.; 2 Day, 495; 10 Co. 130; 5 Serg. & R. 393; 2 Kent C. 298; Law of Patents, 50, 54, 55; 1 Tacitus, ch. 72; 2 Horace, epis. 1, ad Augs.; 2 Wils. 403; 1 B. & P. 331; 7 Johns. 264; 9 Johns. 214; 19 Johns. 364; 5 Bin. 340.

Judge WRIGHT delivered the opinion of the court:

Where one, falsely and maliciously, orally charges another with anything involving moral turpitude, which, if true, will subject him to infamous punishment, or that tends to exclude him from society, or to prejudice him in his office, profession, trade, or business, the parties accused may seek redress by a suit in slander, and recover without proof of actual damage. Where the words are false, the law infers malice, and where their natural tendency is to injure, the law presumes damages. 6 Bac. Ab. 205; Starkie on Slander, 11, 12, 100–110; 5 Johns. 188, 476; 17 Johns. 217; where the slander is written and published, it is denominated libel. A libel in reference to individual injury may be defined to be a false and malicious publication against an individual, either in print or writing, or by pictures, with intent to injure his reputation, and expose him to public hatred, contempt, or ridicule. 4 Mass. 163; 3 Johns. Cases, 354; 9 Johns. 214. Whatever 533] *charge will sustain a suit for slander where the words are merely spoken, will sustain a suit for a libel, if they are written or printed and published, and it will be seen, at one glance, that

many charges, which, if merely spoken of another, would not sustain a suit for slander, will, if written or printed and published, sustain a suit for libel. Words of *ridicule* only, or of contempt, which merely tend to lessen a man in public esteem, or to wound his feelings, will support a suit for libel, because of their being embodied in a more permanent and enduring form; of the increased deliberation and malignity of their publication, and of their tendency to provoke breaches of the public peace. This we understand to be the settled law of libel in this state, sustained by the uniform decisions of our courts, without a single exception within our knowledge.

Subject the publication in question to the test of the definitions given. The publication is declared to be of the plaintiff in his business of maker and vender of bark mills. It imputes to him the infraction of another's patent. This, if true, would subject him, and those purchasing and using his mills, to prosecution. Nothing could have a more direct tendency to the entire destruction of his business. It denies the plaintiff's right to deal in the subject of his occupation, and asserts an adverse inconsistent right which he knew and acknowledged. It thus imputes to him falsehood, fraud, the want of capacity to confer a legal right by the sale of his manufactures. It does not stop here. It asserts, moreover, in direct terms, that he perseveres in this fraudulent and pirating trade upon the rights of the Trasks, because he is "shielded from prosecution by his want of responsibility." If irresponsible to the inventor whose right he was charged with infringing, he was equally so to those who should purchase of him. The charge is, if you deal with this man you incur the risk of lawsuits for violating the rights of others, and he is insolvent, irresponsible to indemnify. Would not such a charge, if true, blacken a man's reputation, injure his business, expose him to hatred and contempt? In our understanding, the publication is unequivocally libelous.

The declaration appears to us sufficient to entitle the plaintiff to judgment.

The point argued for the defendant, that the libel was in separate publications, is not supported by the record; it is alleged to be for publishing a certain libel. The second with the ☞ appears but as a postscript to the first.

534] *NEIL AND OTHERS v. HEPBURN.

Puis darrein continuance; evidence sufficient to sustain such plea.

FROM Cuyahoga. Assumpsit. The declaration contained the common counts for money. Plea, *puis darrein continuance,* that the defendant paid the plaintiffs six hundred and eighty-eight dollars and sixty-nine cents, in full of all moneys then found due for the several causes of action set forth in the declaration, which they received in satisfaction thereof. Issue was joined on this plea; and the evidence being in writing, was by agreement submitted to the court without a jury.

ANDREWS, COLLINS, and P. HITCHCOCK, for the defendants, offered the following evidence:

1. A receipt from Neil, one of the plaintiffs, dated since the last continuance, for one Paddleford's receipt for three hundred and fifty-nine dollars, and Hepburn's two accounts amounting to one hundred and eleven dollars and seventy cents, stated this day, and cash two hundred and seventeen dollars and ninety-nine cents, total amount six hundred and eighty-eight dollars and sixty-nine cents, on account of stage fare received by him, fourth quarter, 1831.

2. An order from Neil to the attorney of record to discontinue the suit.

They cited 5 Johns. 385; Gould's Pl. 374.

WILLEY, contra, submitted no argument.

Judge WRIGHT delivered the opinion of the court:

The question is, whether the evidence read is *prima facie* sufficient evidence of the settlement between those parties, and the satisfaction of the balance by the defendant. Our response is in the affirmative.

Judgment for the defendant

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HARRIET SCOTT *v.* JUSTIN SCOTT.

THIS was a petition for a divorce, adjourned from Geauga county.

Judge LANE stated the case and delivered the opinion of the court:

Held, that the act of the legislature, making habitual drunkenness for three years cause of divorce, does not apply to cases that occurred before its passage.

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*MIAMI EXPORTING CO. *v.* S. J. BROWN AND J. H. LOOKER. [535

A judgment in favor of the Miami Exporting Company, upon a short notice, according to their charter, is *coram non judice* and void, unless the record show a notice regularly made and served.

THIS cause was adjourned from Hamilton county. It was a *scire facias* to revive a judgment in the Hamilton common pleas in favor of the plaintiffs. The *scire facias* was original in the common pleas, and removed here by appeal; plea, *nul tiel record*. The transcript of the record produced showed that the judgment had been rendered upon a notice according to a provision of the company charter. This notice was set out. It had no signature, and the record contained no proof of its service on the defendants, or either of them.

Judge LANE stated the case, and delivered the opinion of the court, deciding that the authority to take jurisdiction by the common pleas, was dependent upon a notice regularly issued and served in due time upon the defendants. Both these facts must appear in the record as the foundation of the jurisdiction. If they do not thus appear, the judgment is *coram non judice*. Such being the state of this case, judgment was given for the defendants.

O. M. SPENCER and FARRAN, for plaintiff.

FOX, for defendants.

BANK OF CHILLICOTHE v. THOMAS L. PIERCE.

Previous to 1822, security in an appeal bond, on appeal from the common pleas to the Supreme Court, became absolutely charged, by judgment in the Supreme Court against the appellant. Suing out and levying an execution upon such judgment, where nothing was made, did not discharge the liability of the security, the plaintiff having done nothing to prejudice such levy.

THIS cause was adjourned from Muskingum county. It was debt upon a bond, and came before the court on an agreed state of facts.

The defendant, with John Matthews, deceased, became security for E. Granger, also since deceased, in an appeal bond, dated August 2, 1819. In the Supreme Court judgment was rendered against Granger, and execution issued and levied upon a tract of land as the property of Granger. The return was "*not sold for want of bidders.*" The levy produced nothing, in consequence of subsequent events over which the plaintiff could have no control. The question raised was as to the continued liability of Pierce.

536] *SWAN, for plaintiff.

STILLWELL, for defendant.

Judge LANE delivered the opinion of the court:

In 1819, when this bond was executed, under the law then in force, the security upon an appeal became bound absolutely for the amount of the debt, upon judgment against the appellant in the Supreme Court. Such was the law when the judgment against Granger was finally rendered. To charge Pierce, it was not then necessary to sue execution against Granger. This being the case, Pierce is not released by the fact of suing and levying the execution, out of which, without fault of the plaintiff, nothing was made. No other ground of discharge is set up. This being held insufficient, judgment must be for the plaintiff.

WM. H. DOUGLASS v. A. HUSTON AND OTHERS.

THIS cause was adjourned from the county of Pickaway. It was a bill in chancery to patch up a title to a tract of land. The case turned upon a matter of fact as to the commission of fraud, which the court, upon the evidence, held not to be made out. Bill dismissed.

STANBERY and OLDS, for complainant.

DOAN and SWAN, for defendants.

LESSEE OF N. LONGWORTH v. BANK OF THE UNITED STATES.

Sheriff's deed for lands sold under execution, correctly reciting the judgment execution, levy, and sale, is *prima facie* evidence of title; but parol evidence is admissible, that it does not in fact cover all the land claimed under it, and embraced in its description of boundaries.

THIS cause was adjourned from the county of Hamilton, upon the motion of the plaintiff for a new trial.

Judge WOOD stated the case, and delivered the opinion of the court:

On the trial, it was admitted that Daniel Symmes died seized of the premises in question, on May 10, 1817. The title of the plaintiff was derived through a sale made by the administrators of Symmes, under an order of the court of common pleas of Hamilton county, directing them to sell "thirty *acres [537 of land, situated in fractional section No. 12, township 4, fractional range 1; or in fractional section No. 7, town 3, fractional range 1; or a part, in both of said sections, being an undivided thirty acres of a tract of seventy acres." The administrators sold to W. D. Jones and conveyed to him a tract of land, in fractional section 12, town 4, and fractional range 1, by specific location, and a deed

from Jones to the lessor of the plaintiff, bearing date on August 22, 1832. The plaintiff then offered parol evidenc to prove that the lands claimed under these deeds were the same actually sold by the administrators, and possession being admitted by the defendants, the plaintiff rested, the court admitting the testimony offered, although it was objected to by the defendants.

The defendants then offered the record of a judgment in the common pleas, rendered August 8, 1816, in favor of the Miami Exporting Company *v.* Daniel Symmes and others; an execution issued on that judgment dated January 23, 1817, on which was an indorsement in these words, "Levied on the following described land, to wit: forty acres lying and being in fractional section No. 12, town No. 4, fractional range No. 1; or in fractional section No. 7, town No. 3, and fractional range No. 2; or a part of said land in each of the foregoing sections, towns, and ranges, etc., as the property of Daniel Symmes. Cincinnati, March 8, 1817." In the appraisement and in a *vendi.* of June 18, 1817, the description is in the same words, and on the *vendi.* the sheriff has returned a sale made in these words: "July 21, 1817, sold the within land to Nicholas Longworth for the sum of five thousand and ten dollars." The defendants also offered in evidence the sheriff's deed of the land to Longworth, dated July 24, 1817, and in which the lands sold are described as recited in the levy, sale, advertisement, and valuation, agreeably with the returns on the execution, but more particularly by the following boundaries: "adjoining lands on the south owned by Jacob Wheeler; on the east by William Lytle; on the north by Jacob Baymiller and Jesse Hunt; and westwardly by the state road, leading to Mad river, by Martin Baum, Smith, Findlay, and J. H. Piatt, being bounded on all sides by the property of the said persons, and supposed to contain forty acres, be the same more or less."

The plaintiffs objected to this evidence, but it was admitted and the defendants rested their case.

The plaintiffs then proposed to prove but forty acres were 538] *levied on and embraced in the levy, return, appraisement, advertisement, and sale under which Nicholas Longworth claims, whereas there were sixty-nine or seventy acres embraced in his deed, to all which he claimed title under his deed. This evidence was objected to and overruled, and a verdict for defendants.

1. Point: Was the sheriff's deed to Longworth properly admitted as evidence of the defendant's title?

2. Did the court err in rejecting the evidence offered by the plaintiff to prove the levy, appraisement, advertisement, and sale were of forty acres only, whereas the defendant's deed contained sixty-nine or seventy acres?

The first point, that the deed was properly admitted, I think, may be supported by the current of the authorities. If the deed is no part of the sheriff's return, it is an act required by law of the sheriff in the execution of his duty to complete the title to the purchaser, and is, uncontradicted, *prima facie* evidence that the land it conveys was levied upon and sold. It is but *prima facie*, and may, therefore, be rebutted by other evidence, that the land levied on and sold, is not the land covered by the deed? The court, therefore, erred in refusing the testimony to show that the land conveyed was not all sold by the sheriff on his levy. This disposes of both points. R. Douglass *v.* McCoy, etc., 5 Ohio, 524.

New trial granted.

V. Worthington, for plaintiff.

N. Wright, Caswell, and Fox, for defendant.

Lessee of Hart's Heirs *v.* Thomas Johnson and others.

Township trustee's office is a public office within the occupying claimant law, in reference to leases of school lands.

Adjourned from Perry county.

Judge Wood stated the case and delivered the opinion of the court:

The question raised here is, whether, upon the facts stated in this case, as reported *ante*, 87, the defendants can claim the benefit of the law for the benefit of the occupying claimant? This question turns on a single point. The act incorporating the original surveyed townships, authorizes the township trustees to lease

the sections reserved for schools. Are leases made by them and 539] recorded by the clerk of the township *within the terms providing for a title recorded in some public office employed by the occupying claimant law? We are of opinion that this question is to be answered in the affirmative. The order for valuation of improvements is accordingly made.

IRWIN and ORTON, for appellants.

STANBERY and HUNTER, contra.

AUSTIN *v.* HAYDEN.

Ante, 388.

Dissenting opinion of Judge Wright.

WRIGHT, J.:

It is conceded on all hands that if an action upon the case was commenced in the court of common pleas, and the plaintiff filed a declaration in trespass, the declaration would abate the writ, because he does not pursue the suit he commenced. Gould's Pl. 28, 196, 269; 4 Bac. Ab. 40. I understand our statutes expressly to require cases appealed to be conducted in the same manner as if originally commenced in the court of common pleas. 29 Ohio L. 178. If this is so, it is not for me to alter the law.

The statute requires of justices of the peace, in cases of appeal, to transmit the original papers to the court of common pleas, to be used on the trial in that court. 29 Ohio L. 178. It moreover requires the appealed suit to be in all things conducted in the court of common pleas as if originally commenced in that court (29 Ohio L. 178); and it requires of the clerk to include the original writ in the final record. 29 Ohio L. 76.

A similar provision as to certifying up the original papers exists where a case is appealed from the common pleas to the Supreme Court, and for the final record. 29 Ohio L. 178. If this were a case in which slander was commenced before the court of common pleas, and a declaration in assumpsit in the Supreme

Court, or case brought in the court below, and a declaration above in trespass, I can not conceive there would be any doubt that the suit would abate. In the case before us, the plaintiff brought an action on the case before the justice, became nonsuit, appealed to the common pleas, and then, instead of prosecuting his action on the case, he declared in trespass with force and arms. He has appealed one case, and proceeds in another.

*However desirable it may be to have the law, as my [540 brethren declare it, so as to allow the same object to be pursued after an appeal in any more expedient form than that originally commenced, I am constrained to think it is not now so.

RING AND RICE *v.* FOSTER.

Ante, 279.

Dissenting Opinion of Judge Wright.

WRIGHT, J.:

The act of assembly dispenses with proof of execution of "any promissory note or bill of exchange" in a case situated as this is. 29 Ohio L. 122. The simple question before the court is, whether the following instrument is a promissory note, for no one claims it to be a bill of exchange:

"Three months after date we promise to pay Samuel Foster, or order, one hundred and forty-three dollars and twenty-two cents; provided Samuel Foster delivers the crop of tobacco raised by him and Trockmiller; the said Foster is to have one-fourth of the above in hand, and in addition three dollars and fifty cents per hundred for that part yet to be delivered, payable one-fourth in hand and the balance in one hundred and twenty days.

"THOMAS H. CUSHING,
RING & RICE,
J. H. HARRIS, *per J. H. Cushing.*

"*April* 28, 1827."

A promissory note is a "written promise for the payment of money, absolutely, and at all events." Bayley on Bills, 1. According to Blackstone, 2 B. C. 467, it is "a plain and direct engagement

in writing to pay a sum specified, at the time therein limited, to a person therein named, or sometimes to his order, or oftener to the bearer at large." To my understanding the instrument before me does not satisfy either definition, or the common acceptation of a promissory note. It is not an absolute promise to pay at all events a certain sum, for part of the amount is dependent upon the contingencies of the delivery of a crop of tobacco, and the quantity estimated at three dollars and fifty cents per hundred. The time of payment is not on a day fixed and certain, but depend-
541] ent the whole upon contingencies, and part upon *double contingencies. If the crop of tobacco was delivered (at what time is uncertain), a fourth of the one hundred and forty-three dollars and twenty-two cents was to be paid down, if not the whole in three months. If such an instrument was offered to a merchant, or a bank, as a promissory note, would it not be rejected at once as no promissory note?

I think the court below erred in admitting the instrument in evidence without proof of its execution, because it is not a promissory note.

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ACTION—

1. Action on a judgment in a sister state. In such action, matter properly to be investigated in the original case can not be drawn into controversy in Ohio. Goodrich *v.* Jenkins, 44.
2. State can sustain an action on promise in writing to commissioners of the canal fund. State of Ohio *v.* Collins, 142.
3. Action for use and occupation only lies where a tenancy is established. Richey *v.* Hinde, 378.

Action in case, see TRESPASS.

ACTIONABLE—

A charge that A. B., giving himself a false name at the time, received a letter to convey, containing money, and promised to deliver the letter, instead of which, he broke it open and used the money, is a charge of larceny, and is actionable. Cheadle *v.* Buell, 70.

ACKNOWLEDGMENT. See WIFE; DOWER.

1. Grant of administration is not the commencement of a suit within the provisions of a statutory saving clause of actions and suits pending. Davis' Lessee *v.* Livingston, 226.
2. Administrator has no power to create a trust. Ib. 239.

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3. In suits against administrators, a count upon an indebtedness and promise by the administrator, *as such*, may be joined with one upon an indebtedness and promise of the intestate, provided the consideration of the demand spring from, or was connected with the estate. Howard's Adm'rs *v.* Powers, 93.

ADMINISTRATOR—

In cases of decedents' estates, where the administrator is before the court, equity will so shape the proceedings as to settle the estate. Piatt *v.* St. Clair's Heirs et al. 243.

Administrators, see EXECUTORS.

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AGREEMENT—

Agreement with some of several defendants to make no defense to the suit, and let the property of co-defendant be sold, if not carried into execution, will not affect the complainant's real rights. Piatt *v.* St. Clair's Heirs et al. 236.

AMENDMENT—

Our statutes of amendments do not touch criminal cases. In these nothing can be amended, except what was amendable at common law. Young v. State of Ohio, 438.

ANCESTOR'S DEBTS. See LANDS.

APPEAL—

1. Appeal from the judgment of a justice, produced to be docketed in the common pleas, at the second term after it is taken—an objection to its being docketed overruled; issue made and prosecution to final judgment. It is not too late to revise the order docketing the appeal on writ of error. Torbit v. Coffin, 34.
2. Appeal from the judgment of a justice must be docketed to the first term of the common pleas to which it is taken. Ib. 34.
3. Appeal does not lie to the Supreme Court from a decision of the court of common pleas, adjudging that the proof adduced to prove the execution of a will is insufficient. Case of Chapman's Last Will, 149.
4. On an appeal from a justice of the peace, plaintiff is confined, in his evidence, to the bill of particulars filed before the justice. Nichols v. Poulson, 305.
5. Appeal bond valid, though an attorney in the cause is one of the securities. Such attorney punishable for violating the rule of court. Wallace v. Scoles, 429.
6. If, upon appeal from the common pleas to the Supreme Court, no bond is taken, the jurisdiction of the Supreme Court does not attach, and exception may be taken by the appellee, after trial and verdict against him. Bradley v. Sneath, 490.
7. Appeal does not lie from a nonsuit, unless it is shown by the minutes that such nonsuit was ordered by the court. Ib. 496.
8. An appealed cause may be retained, that application may be made to amend in the common pleas. Ib. 496.
9. Executor residing out of the state, never having given bond here, not entitled to appeal without giving appeal bond with security. Work v. Massie, 503.
10. Decree of dismissal in the court of common pleas, though pronounced *pro forma*, the parties understanding the cause was to be appealed for preparation and hearing, is final if the appeal is not consummated. White v. Bank of United States et al. 529.

Appeal, see ORIGINAL PROCESS.

ASSIGNMENT—

Assignment of insolvent's choses in action vests the legal interest in the commissioner, and he alone can maintain an action. Johns v. Johns, 272.

ATTORNEY. See APPEAL.

AVERMENT—

1. Declaration that defendant warranted a person applying to the plaintiffs for a loan, to be a respectable man of Tuscarawas county, named Adam

AVERMENT—*Continued.*

Riggle, and averring that the person was not Adam Riggle, whereby plaintiff lost the money loaned, held insufficient. Belmont Bank *v.* Beebe, 498.

2. In assumpsit, where the undertaking is collateral and conditional, notice should be averred. Ib. 499.

3. In declaration for deceit, an intention to deceive should be averred. Ib. 499.

See CONTRACT; COVENANT.

BANK STOCK. See CONTRACT.

BILL OF LADING. See CARRIER.

BILL OF EXCEPTIONS—

Not made part of the record, can not be considered upon a writ of error. Baldwin *v.* State of Ohio, 16.

CARRIER—

1. Stipulation in a bill of lading, that the captain, in case of low water, may reship in other craft, does not vary his obligation to deliver safely. Such stipulation is for his benefit, and continues his liability if resorted to. McGregor & Co. *v.* Kilgore, 361.

2. Where the carrier is held liable for injury of the goods shipped, the rule of damages is the value of the goods at the place of delivery. Ib. 362.

CHALLENGE—

Where several are indicted for a joint offense and all put upon a joint trial, each must be allowed his separate peremptory challenge of jurors. Bixbee *v.* State of Ohio, 87.

CHANCERY—

Will not relieve against a judgment at law, and grant a new trial, where the matter complained of arose in any way from the negligence of the complainant, or because the parties relied upon the promise of the judges to see the proper entry made. Green *v.* Dodge and Cogswell, 82.

COMMON SCHOOLS—

The law regulating common schools does not authorize levying a second tax within three years, in consequence of changing the boundaries of the district, if the tax exceed one hundred and fifty dollars, and the owner is non-resident. Baker *v.* Black et al. 54.

CONSTABLE—

1. When the officers of justice stand justified in law for their acts, the motive which induced them to act is not to be inquired into. Taylor *v.* Alexander, 146.

2. In a trespass against a constable and one of his *posse*, irregular process from a court having jurisdiction of the person and the subject, is a justification, notwithstanding the preliminary steps to the process are irregular. Ib. 147.

CONTRACT—

1. Contract to do an unlawful or immoral act will not be enforced in courts

CONTRACT—*Continued.*

of justice; and the violation of an agreement to participate in crime, will not excuse the other party, who does the act agreed upon, or other criminal acts, in endeavoring to commit it. Forsythe *v.* State of Ohio, 21.

2. When the stipulation is to pay money or land, "on condition the canal passes through Chillicothe," the money within three years, or the land six months after location, final location of the canal fixes the rights of the parties. State of Ohio *v.* Collins, 142.
3. Not necessary to prove the organization of a board of canal commissioners, in a suit connected with the official action of that board. Ib. 142.
4. Not necessary to prove the construction of the canal, where the defendant has made a contract dependent on that event. Ib. 142.
5. Written agreement to pay money, "on condition that the canal passes through the town of Chillicothe," is not affected by proof that defendant understood it should pass on a particular line, without allegation of fraud in obtaining the agreement. Ib. 142.
6. A party having rights under a contract, disclaiming those rights under a mistake as to their character, is not concluded by such disclaimer; nor is he affected if another purchased in consequence, if that other has abandoned the purchase, and does not claim the protection of being an innocent purchaser without notice. Williams *v.* Champion & Goodrich, 170.
7. Where a purchaser of land has performed in part the terms of the contract, and the failure to perform the residue is occasioned by circumstances which neither party could control, equity will arrange a just compensation and charge it upon the land sold. Ib. 171.
8. Where continuous litigation has existed between parties to a contract, in a legal view affirming its existence, it can not be considered as abandoned, that one party may have made declarations to that effect. Ex'rs of Wilson & Abraham *v.* Tappan, 173.
9. Where time is not of the essence of the contract, specific performance may be decreed against a purchaser, if a good title can be made at the time of the decree. Ib. 174.
10. Vendor of land must pay taxes until conveyance made, if not otherwise stipulated. Ib. 174.
11. Permitting sale for taxes so stains the title that specific performance will not be ordered. Ib. 174.
12. A bank may receive from stockholders transfers of stock in payment of debts previously contracted by them; and at a distant day subsequent, equity will not compel the party to reinstate his stock. Taylor *v.* Miami Exporting Co. et al. 218.
13. If one purchase of the bank a large amount of stock to multiply his votes for a board of directors, vote upon such stock, and immediately after the board direct that the purchase money of the stock be returned, and the stock taken again by the bank, equity will not compel the pur-

CONTRACT—*Continued.*

chaser to refund the money and take back the stock, where the proofs show no actual loss attendant upon the transaction. Ib. 222.

14. A paper purporting to be a receipt, but containing, in truth, a complete contract between the parties to it, can not be explained by parol, as can be mere general receipts for property or money. Stone v. Vance et al., 247.

15. Contract to convey as soon as purchase money is paid, is mutual, and calls for simultaneous performance. Party that would sue upon such contract must perform or tender performance of his own part, before a cause of action accrues. Webb v. Stevenson, 293.

16. Contract of lease recites that, in consideration of the rents hereinafter mentioned and agreed to be paid, lessor leases lessee a farm and stipulates that lessee may use timber for certain purposes, and may seed certain grounds, "*in consideration whereof*," the lessee agrees to pay certain rents. Plaintiff (lessor) must aver that the lessee enjoyed the premises, or that lessor tendered him the enjoyment. Without such averment, the declaration is bad. Tullis' Adm'rs v. Wiley's Adm'r, 296.

17. Collateral undertaking by one, to which another adds, "I make myself jointly responsible," is not a joint contract. Camp v. Huler & Marvin, 418.

18. Upon parol contract for the sale of lands, mere payment of the consideration does not take the case out of the statute of frauds and perjuries. Stites v. Keller and Skinner, 489.

See RECITAL; WIFE.

19. Joint note stipulating that it may be continued from time to time, upon payment of interest, binds all parties though part were securities, and the continuance had without consultation with them. Reddish's Ex'rs v. Watson et al. 512.

20. Contract to pay five hundred dollars, with fifteen dollars interest in advance every thirty days, is valid, and the interest paid on the contract in advance can not be held as part payment of the principal. The failure to pay such interest in advance puts an end to the contract, from which time six per cent. only is recoverable. Ib. 513.

COPARTNERSHIP—

Values fixed upon stock brought into a firm and conducted for a time, not to be readjusted in equity without proof of fraud. Errors in calculation or in stating the account upon settlement may be corrected. Mayo v. Bonner et al. 527.

COPY OF A DEED—

Copy of a deed, duly certified, is, by the act of 1831, made evidence, without accounting for the absence of the original, though the party offering it be the immediate grantee. Burnet v. Brush, 32.

CORPORATION—

Where a religious society purchase land, and the title vests in them in fee, as a corporation, the majority of the society have a right to control its

CORPORATION—*Continued.*

use and occupation—of which they can not be deprived by any supposed error of doctrine. Keyser et al. v. Stansifer et al. 365.

COSTS—

Payment of costs of original bill, no bar to the action on land against securities. Kent et al. v. Bierce et al. 351.

COUNTY RIGHTS—

1. Individual holders of lots of ground in a square conveyed to the county, for the use of public buildings and a court-house, have not such individual interest in the ground as will authorize chancery, on their application to enjoin county commissioners from leasing portions of the ground to individuals, reserving rent to the county. Smith et al. v. Heuston et al. 102.
2. And such persons have no right to proceed in chancery, to enforce the public right to such ground. Ib. 103.

COURT—

Court, on general pleadings, can not take cognizance of the commencement or termination of the terms of a court of law. Kent et al. v. Bierce et al. 352.

COVENANT—

1. Covenant to convey a tract of land, specifyiug no time of conveyance, and a covenant to pay therefor so much money in hand, and so much at a future day, are mutual covenants. McCoy's Adm'rs v. Bixbee's Adm'rs, 312.
2. In such case of mutual covenants, the purchaser can not have a cause of action, without averring the payment or tender of the purchase money. Ib. 313.

CREDITOR—

1. Creditor, by giving time to the principal debtor, discharges the security or indorser, if such extension of credit be given upon an obligatory contract. Bank of Steubenville v. Hoge et al. 17.
2. The defense offered by the obligor, to show his relation as surety, is as admissible at law as it would be in equity. Ib. 18.
3. Creditor may maintain a bill in chancery, for distribution of decedent's assets, against executor or administrator, before obtaining judgment. Grosvenor & Co. v. Adm'rs of Austin, 112.
4. The separate individual creditors of one deceased member of a firm can not claim a preference, in the decedent's individual estate, against the creditors of the firm. Ib. 112.
5. A judgment creditor may resort to chancery to subject the effects of his debtor, beyond the reach of execution at law, before he takes out execution on his judgment, if it appear that the debtor has not effects to satisfy the judgment, or the effects are connected with equities or trusts, or involve a variety of interests, so that adequate remedy can not be had at law. Piatt v. St. Clair's Heirs, Bank of United States, et al. 233.

CREDITOR—*Continued.*

6. Judgment creditor purchases land on his own execution as defendant's property, takes a deed, and enters satisfaction. The title fails. He can not have the satisfaction set aside and a new execution awarded. Vattier v. Lytle's Ex'rs, 482.

CREDITORS. See TRUSTEE; SCI. FA.; HEIR.

COMMISSIONERS—

Of canal fund. See ACTION

DEBTOR. See TRUSTEE.

DEBTS. See LANDS.

DECLARATION—

1. Declaration good where various grounds of indebtedness are alleged in one count, and a single and general promise and breach assigned. Nichols v. Poulson, 307.
2. Declarations made before the commencement of title under which the party claims are not evidence in ejectment. Wallace's Lessee v. Miner, 370.

DEDICATION—

1. Dedication of lands for a public use accrues as a grant; a grantee is not necessary to its validity. Brown v. Manning et al. 303.
2. Dedication in specific terms, on the recorded plat of a town, is not to be affected by parol proof of the intention of the donors. Ib. 303.

DEMURRER—

A joint demurrer to two pleas, one held good, judgment goes for the party pleading the pleas. Amendment allowed. Kent et al. v. Bierce et al. 352.

DESCRIPTION. See TAXES.

DEVISE—

1. Devise to "my son, H. C., of all my estate real and personal, subject to the following bequests," one of which is to B. C., $1,000, to be paid to her at the age of eighteen, "in land, at such place as my son Henry can buy," does not contain a charge on the devisor's real estate in the hands of purchasers from the devisee. Coonrod v. Coonrod et al. 115.
2. In such devise as above, the purchaser is not bound to attend to the application of the purchase money Ib. 116.

DISMISSAL. See APPEAL.

DOWER—

1. Widow to be endowed according to the value of the ground at the time of assignment, excluding increase of value from improvements, but including increased value from other extrinsic and general causes. Dunseth v. Bank United States, 77.
2. To bar the dower of the wife by a deed, executed under the act of 1805, it is necessary that the certificate of acknowledgment should show the wife was made acquainted with its contents. Connell v. Connell, 358.

DUE DILIGENCE—

Due diligence to charge indorser, see PROMISSORY NOTES.

EJECTMENT—

1. To recover in ejectment, upon prior possession alone, that possession must have been actual and notorious. Abram's Lessee v. Will, 165.
2. Plaintiff in ejectment may recover for any interest he may prove a title to, less than the claim in the demise. Treon's Lessee v. Emerick, 399.

See DECLARATIONS.

ERROR—

1. It is not error, which will sustain a motion in arrest, that the traverse jury were not summoned within the time specified by the statute. Harley v. State of Ohio, 405.
2. The grand jury impaneled and sworn, etc., recited in an indictment, is sufficient, without specifying the number. Young v. State of Ohio, 436.
3. Defendant escapes before judgment; entry "continued for *execution and judgment.*" These words surplusage, or clerical error that may be amended. Ib. 436.
4. Motion in arrest pending. Final judgment pronounced, without special disposition of the motion, is not error. Ib. 437.
5. Writ of error *coram nobis* allowed in a proper case, such as death of party before judgment. Dows & Carey v. Harper & Paine, 520.
6. It is error for the court to decide the facts of a cause when no issue is made. Headley v. Roby, 524.

See INDICTMENT.

ESTOPPEL. See RECITALS.

EVIDENCE—

1. Evidence admitted may, in a proper case, be commented upon by the court in giving it to the jury. Abram's Lessee v. Will, 165.
2. Where evidence is given to the jury, the court will not set aside the verdict, unless it is palpably against the evidence, or its weight. Webb & Vanlear v. Insurance Co. 472.

Evidence, see MORTGAGE.

EXECUTORS—

Executors and administrators may be compelled to account and distribution in equity. Cram et al. v. Green's Adm'rs, 429.

See APPEAL.

FERRY—

Keeper of a ferry from the Virginia to the Ohio shore, across the Ohio river, landing persons upon the lands of the keeper of a ferry on the Ohio shore, is a mere trespasser, whom chancery can not restrain by an injunction. Ross v. Page, 167.

FI. FA.—

1. *Fi. fa.* issued without seal from a court having and using a seal, is void. Lessee of Boal and others v. King and others, 12.

FI. FA.—*Continued.*

2. Levy on such writ, and a sale on a subsequent valid writ, conveys no title. Ib. 13.

FRAUD—

1. It is not sufficient evidence of fraud, to vitiate a contract, that a great bargain was obtained in the purchase of a litigated property from an embarrassed debtor. Douglas *v.* Huston et al. 164.
2. Fraud may be specially pleaded in bar, even where it might be given in evidence on the general issue. Saunders *v.* Stotts, 382.

See PLEA.

FRAUDULENT AGREEMENT. See LANDS.

GENERAL AVERAGE. See INSURANCE.

GENERAL ISSUE. See FRAUD.

GRANT—

Dedication of lands for a public use accrues as a grant; a grantee is not necessary to its validity. Brown *v.* Manning et al. 303.

GUARDIAN—

1. Land inherited by an infant from his father, sold by guardian, and converted into money, under an order of court. The infant dies in his minority. His half brothers and sisters, children of his mother by a second marriage, are his heirs. Armstrong et al. *v.* Miller et al. 124.
2. In such case chancery has jurisdiction. Ib. 124.
3. Guardian bound to employ money of an infant, in his hands, so as to make interest, if practicable, and is chargeable with interest if he fail to do so. Ib. 124.

HALF BLOOD—

Land inherited by an infant from his father, sold by guardian, and converted into money under an order of court. The infant dies in his minority. His half brothers and sisters, children of his mother by a second marriage, are his heirs. Armstrong et al. *v.* Miller et al. 124.

HEIR—

1. The heir in whom lands vest, charged with the ancestor's debts, is bound to pay the taxes; and if he suffer them to accumulate, and the lands to be sold, become himself the purchaser, and have them conveyed to his guardian, or to another, *in trust*, the estate, as to creditors of the deceased, is not changed. Piatt *v.* St. Clair's Heirs et al. 239
2. A sale by an heir is good, but the purchaser takes subject to the debts of the ancestor. Ib. 240.
3. Persons dealing with heirs for lands, are chargeable with knowledge of the extent of their rights. Ib. 240.
4. Where there are several tracts of land descended, and some have been aliened by the heir, equity will compel a creditor to seek his debts, *first*, of that unaliened, and, *secondly*, to proceed back upon that aliened, in regular order, beginning with the last aliened. Ib. 242.

Heir, see LANDS.

INDORSER. See PROMISSORY NOTES.

INDICTMENT—

1. Indictment for house-breaking, and committing in the house an assault and battery, under the statute, must aver that some person resided or dwelt in the house. Forsythe v. State of Ohio, 24.
2. Two indicted of a joint offense, court may order a joint trial, though a separate trial be demanded by one. Bixbee v. State of Ohio, 86.
3. Where several are indicted for a joint offense, and all put upon a joint trial, each must be allowed his separate peremptory challenge of jurors. Ib. 87.
4. That the indictment does not aver that the grand jury were impaneled and sworn to inquire of "crimes and offenses," committed within the body of the county, is not error. Hurley v. State of Ohio, 405.
5. When the indictment contains three counts, and the jury say they find the defendant not guilty on the first, but can not agree on the other counts, it is not error for the court to refuse to receive the verdict and have it recorded. Ib. 403.

INDIAN RESERVATION—

Where the consideration of a note is a lease of lands within the Indian reservation, and the lessor makes title under an Indian, plaintiff can not recover. Chaffee v. Garret, 426.

INJUNCTION—

1. It is not necessary, on the dissolution of an injunction and dismissal of the bill, where the injunction did not operate, to stay execution upon a former decree or judgment, to sue execution against the complainant, before a suit can be sustained on the bond against the securities. Kent et al. v. Bierce et al. 347.
2. An injunction may be continued on the complainant's application upon the terms of giving a new bond, with new security; and if such be the terms of the order, the first bond is discharged. Kent et al. v. Bierce et al. 351.

INSOLVENT DEBTOR—

Neither sheriff nor county commissioners are bound to feed an insolvent debtor in jail. He must provide for himself in what manner he can. Wadsworth v. Wetmore et al. 439.

INSURANCE—

1. In a policy upon the body of a steamboat upon time, the insurer is not chargeable with the wages of the crew while the boat is stranded within the time insured. Gazzam v. Cincinnati Insurance Co. 73.
2. The insurers are liable for the entire expense of repairing the injury, though only part of the repairs was effected at the first port made after it occurred, and the remainder at another port. Ib. 73.
3. Running the boat while unseaworthy, after the injury complained of, does not avoid the policy. Ib. 74.

INSURANCE—*Continued.*

4. The assurers have no right to have the items of loss for *jettison* and general average analyzed, to ascertain, if upon each separately, the amount is equal to that for which the assurers have become liable. Ib. 74.

5. A proposition by the insured to abandon for a total loss, which is given up upon an agreement of the insurer to pay his proportion of the expense of repair, is not an agreement to defray the whole expense of repair, nor such an interference with the wreck, to prevent an abandonment as will subject the insurer to pay any greater loss than would otherwise be legally adjusted by the policy. Webb & Vanlear v. Protection Insurance Co. 473.

6. A policy of insurance upon the hull of a steamboat, on time, does not cover expenses for the ordinary wages of the crew while navigating the boat into port for repair after her founder. Ib. 474.

7. Insurer is not liable for wages of the crew between the place of founder and discharge, on the direct line of the voyage. Ib. 474.

8. Commissions paid a commission merchant for advancing repairs, in a home port, are not chargeable against the insurer; and if the advance be at the port where the policy is executed, it is *prima facie* the home of the boat. Interest upon the amount of the loss may be assessed, after the expiration of the stipulated sixty days from the proof of notice. Ib. 474.

9. Such a policy (upon the hull of a steamboat, on time) does not cover wages paid to hands that were of the crew, who were discharged at the port for repair, and re-employed as common work hands in the repair except for the wages of ordinary hands. Ib. 475.

INTESTATE ESTATE—

Where an intestate estate is bound, as security, for one of the distributees for a debt in judgment, and the administrator, by arrangement with the distributees, pays the judgment out of the assets of the intestate estate, and takes an assignment of it to themselves, the assignees can not enforce the judgment lien upon land bound by the judgment, but subsequently conveyed to a stranger. Skinner v. Lehman's Heirs, 433.

JETTISON. See INSURANCE.

JOINT OFFENSE. See INDICTMENT; CHALLENGE.

JOINDER. See PLEADING.

JUDGMENT LIEN—

Judgment lien is lost, if execution is not sued out and levied within a year, as against a subsequent *bona fide* creditor, where execution is levied within the year. Thompson, Adm'r, v. Atherton, 30.

JUDGMENT. See MORTGAGE.

JURY—

1. In a capital case, where the jury state they can not agree, the court may, in their discretion, discharge them, remand the prisoner for another trial, and continue the case. Hurley v. State of Ohio, 402.

JURY—*Continued.*

2. The Supreme Court may direct a struck jury for the trial of a cause pending before it, in a different county from that in which the order is made. Seely *v.* Blair, 449.

LANDS—

1. Lands, at the death of ancestor, descend to the heir, and are his, charged with the ancestor's debts, until the representative of the personal estate of the deceased proceed to convert them into money to pay the debts. Platt *v.* St. Clair's heirs et al. 238.
2. A sale of land, by administrator, for debts, to a trustee, to place it beyond the reach of creditors, under an agreement or understanding that he should hold it for the benefit of the heirs, and such debts as the parties might agree, is fraudulent and void. Ib. 239.

Land, see TAXES.

LEASE. See WIFE.

LEVY—

1. Levy on a defective writ to *seise* gives no authority to sell. Lessee of Boal et al. *v.* King et al. 13.
2. Levy and sale on execution of a tenant in common's interest, as by specified metes and bounds, is good for his undivided proportion within such boundaries. Treon's Lessee *v.* Emerick, 398.
3. Where upon *fi. fa.* sheriff levies upon chattels, and leaves them with the debtor, taking bond for the delivery, and the goods are not delivered, a return of the facts does not excuse the sheriff from liability to the plaintiff upon amercement for the whole debt. Wadsworth *v.* Parsons, 450.

LICENSE—

In a prosecution for keeping a disorderly tavern, it is not necessary for the prosecution to produce, at the trial, the license. Equivalent proof may be given in evidence. Baldwin *v.* State of Ohio, 16.

LIEN—

1. Liens upon land are given by statute, and can not be extended in equity. Douglas *v.* Huston et al. 162.
2. Judgment creditor acquires no lien in equity upon the choses in action of his debtor, until a bill is filed to charge them. The older equity is always preferred. Ib. 163.
3. When one has a lien upon two funds, and another a posterior lien upon only one of them, the one having both liens will be compelled first to exhaust the subject of his exclusive lien, and be permitted only to resort to the other for the deficiency. Ib. 242.

LIMITATION—

1. When the statute of limitations begins to run against the intestate, in his lifetime, it will run to its completion without interruption by the death. Granger's Adm'r *v.* Granger, 42.
2. Declaration avers indebtedness in 1818. Plea of the statute of limita-

LIMITATION—*Continued.*

tions. Replication, demand in 1827. Demurrer to replication. Held, that cause must be decided on the pleadings, and that the statute operates. Bigelow's Ex'r v. Bigelow's Adm'r, 98.

3. Fact, that plaintiff, as executor, was trustee, can not, at law, take the case out of the statute. Ib. 98.

4. Causes of action, accruing under laws repealed, if barred by those laws whilst in force, continue barred during their continuance, shall nevertheless, be limited by them. Ib. 98.

5. The terms, "*beyond sea*," in the statute of limitations of 1804, are equivalent to "*without the limits of the state.*" Richardson's Adm'rs v. Richardson's Adm'rs, 125.

MANDAMUS—

1. Proceedings upon mandamus must be in conformity to the common law practice. The Universal Church v. Trustees of Section 29, Columbia Tp., Hamilton Co. 447.

2. Return to a mandamus *ni. si.* for the distribution of proceeds of ministerial lands, that before application made, the money was all distributed, is a sufficient return. Ib. 448.

MARRIED WOMAN—

Is capable in law to give consent to the breaking and entering the dwelling of her husband, with a view to the commission of adultery with herself. Forsythe v. State of Ohio, 23.

MEDICAL SOCIETIES—

The repeal of section 11 of the act incorporating medical societies of February 26, 1824, making all contracts for services, as a physician, *not licensed*, valid, does not revive the contract and enable the plaintiff to recover for such services after the repeal; such services being performed during the existence of the law. Nichols v. Poulson, 309.

MISNOMER—

Where an indictment alleges that an affidavit was made, purporting to have been made by John K. Pickens, and the affidavit produced is actually made by John Pickens, no reference being had to John K. Pickens, the variance is fatal. Judgment reversed, and order to discharge prisoner. Pickens v. State of Ohio, 272.

MISTAKE—

Mistake of the clerk in entering judgment, by putting the name of the defendant in error for that of the plaintiff, amended by the court. Torbet v. Coffin, 274.

MONEY LENDER—

Where an obligation is taken from the borrower for a greater amount than the money lent and the stipulated interest, with an undertaking on the lender's part to receive a less sum in discharge of the obligation, if punctually paid, chancery may relieve against the excess as a penalty. Brockway v. Clark, 50.

MORTGAGE—

Upon a *sci. fa.* on a mortgage, where the mortgagor, to show *payment*, exhibits evidence of his dealings, and also of a judgment in his name against the mortgagee, and the jury find the *payment* and a balance due the mortgagor, the judgment offered in evidence is not merged in the judgment for the defendant, upon the *sci. fa.* on the mortgage, or extinguished, but stands as a judgment to the extent of the balance remaining due the mortgagor. Piatt *v.* St. Clair's heirs et al. 234.

NEGOTIABLE PAPER. See PROMISSORY NOTES.

NEW TRIAL—

1. Where the whole case is before the court, and in its opinion a plaintiff has rightly recovered, a new trial should not be granted, though at the trial a point of law had been incorrectly ruled against the defendant. Hart's Lessee *v.* Johnson, 91.
2. Where facts are disclosed, on a motion for a new trial, affirming the correctness of the verdict, a new trial ought not to be granted, whatever errors may have intervened. Earl's Lessee *v.* Shoulder, 417.

NINE-PIN ALLEYS—

Nine-pin alley kept in town by keeper of public house, being unlawful, builder of such alley can not recover therefor upon a general assumpsit. Spurgeon *v.* McElwain, 444.

NON EST FACTUM—

Non est factum, in covenant, is a general issue for the purpose of appending a notice of offset under our statute. Granger's Adm'r *v.* Granger, 41.

NONSUIT—

Leave to enter a nonsuit will not be received after verdict. Taylor *v.* Alexander, 148.

OBJECTIONS—

Objections to the array of a jury, because it has varied in unessential particulars from the law in the selection, will not be listened to, nor will they be received after challenge for cause. Forsythe *v.* State of Ohio, 20.

OFFICERS—

When the officers of justice stand justified in law for their acts, the motive which induced them to act is not to be inquired into. Taylor *v.* Alexander, 146.

OFFICIAL BONDS—

1. In suits on official bonds by party injured, it is sufficient to name the person for whose use the suit is brought, in the process and declaration. State of Ohio *v.* Caffee, 151.
2. In suits upon official bonds, under the statute of Ohio, the plaintiff must set forth the condition of the bond, and assign breaches, in the declaration. Ib. 152.
3. In assigning a breach on the bond of a clerk of the court, it is requisite to be particular enough to apprise the defendant of the breach of duties complained of. Ib. 153.

ORIGINAL PROCESS—

Original process issued by a justice of the peace can not be made part of the record, by oyer, on appeal to the common pleas. Austin v. Hayden, 388.

OYER—

1. If the defendant in debt, upon judgment, would avail himself of the want of process, or of his non-appearance in the original suit, he must crave oyer of the record declared on and set it out. Evans, for use of Bell, v. Instine, 118.
2. All allegations in pleading of matter of record can be proven only by the record. Ib. 118.

Oyer, see RECITAL; ORIGINAL PROCESS.

PAROL CONTRACT. See CONTRACT.

PARTITION—

1. The recital in a deed, made under an order for partition, of the term when the order was made, is not conclusive, but may be explained by proofs. Lessee of Glover's Heirs v. Ruffin, 268.
2. In the case of an order for sale of real estate on petition for partition, under the act of 1810, the proceeding being *in rem*, before a court of competent jurisdiction, it must be presumed that the court made the order, on a state of facts being proved that gave jurisdiction and authorized the exercise of it. Ib. 269.

PLEA—

2. *Non est factum*, in a covenant, is a general issue for the purpose of appending a notice of offset under our statute. Granger's Adm'r v. Granger, 41.
2. *Nul tiel record*, to an action on a judgment of a sister state, draws nothing into controversy, but the existence of that record. Goodrich v. Jenkins, 44.
3. *Scire facias* against an executor, to charge him personally, recites receipt by him of $3,000, for which he had not accounted. Plea that defendant had fully administered, that he had no assets in his hands when *sci. fa.* was sued, and that he did not receive $3,000, as alleged in *sci. fa.* The plea adjudged bad, on special demurrer, both as insufficient, and for duplicity. Rumbarger v. Stiver, 100.
4. Plea to an action on a sealed note, that it was obtained by fraud, covin, and misrepresentation, good on demurrer. Saunders v. Stotts, 380.
5. Plea of *autre fois acquit* must set forth not only the verdict of the jury in the former trial, but a judgment thereon, or it is bad. Hurley v. State of Ohio, 404.

PLEADING—

1. Joinder to demurrer, "in short," insufficient. Headley v. Roby, 524.
2. A defense which can only be made by plea, may, if demurrer is overruled, be made by answer. White v. Bank of United States et al. 530.

See DEMURRER.

POSSESSION—

Possession of land before patented, can not be regarded as adverse to the government, and protected by the statute of limitations. Wallace's Lessee *v.* Miner, 368.

PRACTICE—

1. The court in bank, as a general practice, will only consider those questions which are submitted in the county, and there reserved for decision. Gazzam *v.* Cincinnati Insurance Co. 75.
2. Good practice requires of the clerk of the Supreme Court to add to the final record of appeal causes, the order for a mandate to court of common pleas; and of the latter clerk to minute on the journal the judgment of Supreme Court, the receipt of the mandate, and the order for execution. Earl's Lessee *v.* Shoulder, 416.

PRESUMPTIONS—

Presumptions can not be received to contradict admitted facts. Wallace's Lessee *v.* Miner, 370.

PROCESS—

A clerk of the court is not bound to issue process, without a written precipe is filed according to the statute. State of Ohio *v.* Caffee, 154.

PROMISSORY NOTES—

1. *Quære:* Is the indorsee, under the plea of *non assumpsit*, without affidavit, *bound to prove the indorsement* of the note. Bush *v.* Ellsworth, 169.
2. In a suit by an indorser against the maker of a promissory note, the question of due diligence, where the facts are not disputed, is one of law, to be decided by the court. Davis *v.* Herrick, 66.
3. Where the facts *as to due diligence* are contested, the question of law becomes mixed with fact, and is for the decision of the jury, under instructions from the court, upon the hypothetical state of facts claimed to be proved. Ib. 66.
4. As to negotiable paper strictly commercial, such as that, on its face, negotiable at banks, the act of Ohio, of 1820, makes no change in the rule of the law merchant. Ib. 66.
5. A demand of the maker of a negotiable note, and notice on the ninth day after the note arrived at maturity, is not using *due diligence* to charge an indorser. Ib. 66.
6. The payee of a negotiable note, in a suit between the assignee and the maker, is a competent witness to prove upon what terms the assignment was made, if called to the stand by the maker, their interests being adverse. Stone *v.* Vance, 248.
7. A note made and indorsed for the accommodation of the maker, to be discounted at a bank where its discount is refused, can not be transferred as a business note, to one having knowledge of the facts, and the amount recovered of the indorser. Ib. 249.
8. A writing in these words: "Three months after date, we promise to pay S. F., or order, one hundred and forty-three dollars and twenty-two

PROMISSORY NOTES—*Continued.*

cents; provided the said S. F. delivers the crop of tobacco raised by him and T., then said F. is to have one-fourth of the above sum in hand, and, in addition, three dollars and fifty cents per hundred for that part yet to be delivered, payable one-fourth in hand, and the balance in one hundred and twenty days. April 28, 1827"—is a promissory note within the statute dispensing with proof in certain cases. King & Rice *v.* Foster, 281.

9. In an action upon such a writing as above set forth, executed by four, and process served on two only, it is not necessary to prove the execution of the other two. Ib. 281.

PROOFS—

1. Proofs other than memorandums in writing on the minutes of the court of common pleas, to show that a mandate to carry a judgment to the Supreme Court was issued, admissible. An execution issued upon it, and a levy made on such execution, may be submitted to a jury, and the facts may be rightfully so found on such proofs. Earl's Lessee *v.* Shoulder, 416.

2. Answer in chancery, by a defendant in ejectment, in a chancery case on the same subject, is admissible as proof of his declarations. Ib. 417.

PROPOSITION—

Proposition in writing to the canal commissioners to convey grounds, for hydraulic purposes on the canal, upon certain terms and conditions, not accepted by resolution, or otherwise concluded by specifying the land or reducing the agreement to specific terms, can not be specifically enforced in equity. State of Ohio *v.* Baum's Heirs et al. 386.

PURCHASER—

Purchaser of real estate at administrator's sale, if evicted by the heir, entitled to the benefit of the occupying claimant law. O. Longworth and others *v.* R. Wolfington and others, 9.

RECEIPT. See CONTRACT.

RECITAL—

1. Recital that by the contract declared on, the defendant acknowledged himself bound to pay one hundred and eighty dollars, to be paid at a time stated. The contract exhibited upon oyer, stipulates to pay "a yearly rent of sixty dollars." It is a fatal variance. Tullis' Adm'r *v.* Wiley's Adm'r, 297.

2. Recitals are not estoppels where the deeds containing them are not operative. Wallace's Lessee *v.* Miner, 370.

RELIGIOUS SOCIETY. See CORPORATION.

RECOGNIZANCE—

When a justice committed a person charged with a crime the court of common pleas, then in session, might recognize the accused for his appearance from day to day, without a *habeas corpus*, and without inquiry into the circumstances. State of Ohio *v.* Dawson & Tracy, 252.

RECORD—

1. Indorsement of security for costs made after suit brought, no order of court requiring such indorsements appearing in the minutes of the proceedings, is not a part of the record. Noble v. Shearer & Markley, 427.
2. Upon record of judgment for money, debt sustainable. Headley v. Roby, 523.

Record, see ORIGINAL PROCESS.

SALE OF LANDS. See LANDS.

SCHOOL LANDS—

1. Lease of them, under the law directing leases to be granted for ninety-nine years, renewable forever, reciting the law under which it was executed, is to be construed a lease according to the statute, though in terms it imports a conveyance in fee. Lessee of Hart's Heirs v. Johnson, 88.
2. A defendant, in ejectment, having purchased a lessee's interest, as for a forfeiture, can not impeach the validity of the lease against the heirs of the original lessee. Ib. 89.
3. Judgment and execution in the name of the treasurer of the township, instead of the trustees, as directed by law, can not be held void, but voidable. Ib. 90.
4. An entry to forfeit leasehold estate for non-payment of rent, must be for the entire tract of ground leased, without reference to sub-leases of part. Ib. 91.

SCIRE FACIAS—

1. The right to proceed by *sci. fa.* to charge decedent's lands in the hands of heirs, no longer exists. Such land must be converted into personalty by the administrator to pay debts. The heir and his alienee hold the lands descended, discharged of the ancestor's debts, if the creditor do not assert his claim within five years after the administration account is settled. Piatt v. St. Clair's Heirs et al. 237.
2. Where letters of administration are revoked, and an administrator *de bonis non* appointed, *scire facias* can not be sued in the name of the removed administrator, to revive a judgment rendered in his favor whilst in office. Pitcher's Adm'r v. Reese, 420.
3. In *scire facias* to revive a judgment, it is not necessary to aver specially that no execution had been issued. Ib. 420.

SECURITIES. See INJUNCTION; INTESTATE ESTATE.

SET-OFF—

Non est factum, in a covenant, is a general issue for the purpose of appending a notice of offset under our statute. Granger's Adm'r v. Granger, 41.
2. In a suit by an administrator, upon a claim of the intestate, defendant may set off any demand of his against the intestate. Ib. 41.
3. A defendant in such case can not set off a demand of his against the intestate, for money paid after his death, by the defendant, upon an ob-

SET-OFF—*Continued.*

ligation entered into in his lifetime, as security for him. Such claims look to the general assets for satisfaction. Ib. 42.

SHERIFF—

1. Sheriff (in an action against him, for an escape on final process) can not excuse himself by proof that the jail was insufficient, the county being liable to indemnify him if the escape was from that cause. Richardson *v.* Spencer, 13.
2. In such action against sheriff, on the general issue, it is competent for the defendant to prove, in mitigation of damages, that the debtor had no property. Ib. 14.
3. On motion for amercement of sheriff, pleadings not necessary. Wadsworth *v.* Parsons, 452.

SPECIAL BAIL—

Special bail may be ordered by the court, after action brought, upon sufficient cause being shown. Headley *v.* Roby, 522.

SPECIFIC PERFORMANCE—

A general decree, in a suit by purchaser of land, asking specific performance, can not be avoided by investigating the grounds upon which it was decided, in a new bill, in relation to the same matter. Wilcox *v.* Balger, 409.

SUPREME COURT—

When the judges of the court of common pleas are so interested that a quorum can not sit to take proof of a will, the case can not be certified to the Supreme Court for taking such proofs. Hunter's will, 499.

SURVEY—

A call in a survey, for a stream not navigable, is a call for the main branch of such stream, and the boundary is the middle of the stream. Benner's Lessee *v.* Platter et al. 507.

TAXES—

1. Vendors of land must pay taxes until conveyance, if not otnerwise stipulated. Ex'rs of Wilson & Abraham *v.* Tappan, 174.
2. Permitting sale for taxes so stains the title that vendor can not ask a specific performance. Ib. 174.

Taxes, see HEIR.

3. Sixty acres, part of north half section 13, insufficient description of land sold for taxes. Treon's Lessee *v.* Emerick, 399.
4. Land sold for taxes before patent issues, the legal title of the patentee not affected by such sale. Stuart's Lessee *v.* Parish, 477.

TORT—

Tort can not be waived, and rent claimed in an action of assumpsit, in case of entry on land tortious. Richey *v.* Hinde, 379.

TOWN PLAT—

1. Town plat made by agent—his numbering lots, laying out streets, etc.,

TOWN PLAT—*Continued.*

recognized by the proprietors, and acted upon by them—is sufficient proof of his authority. Brown *v.* Manning et al. 304.

2. Individual owner of lots adjacent to a town plat, may proceed in equity to enjoin proprietors from making private appropriations of a square dedicated for public purposes. Ib. 304.

TRESPASS—

1. Keeper of a ferry from the Virginia to the Ohio shore, across the Ohio river, landing persons upon the lands of the keeper of a ferry, on the Ohio shore, is a mere trespasser, whom chancery can not restrain by injunction. Ross *v.* Page, 167.
2. In case before a justice, for killing a hog, plaintiff may declare in trespass in the common pleas. Austin *v.* Hayden, 389.

TRUST—

1. Administrator has no power to create a trust. Piatt *v.* St. Clair's Heirs et al. 239.
2. If a minor were to undertake to create a trust through a third person, he, if supposed capable of making such contract, is chargeable with the legal fraud, and can derive no advantage from it. Ib. 239.

TRUSTEE—

1. When a security receives from the principal debtor demands, for the purpose of discharging the debt, by their transfer to the creditor, or by payment of the money collected, he holds the claims, or their proceeds, as trustee of the creditor. Green *v.* Dodge & Cogswell, 85.
2. Trustee of a fund, in which several parties are interested, has no right to make any agreement to advance the interest of one of the parties at the expense of another of them, even if confirmed by the court. Piatt *v.* St. Clair's heirs et al. 239.

Trustee, see LANDS.

USE AND OCCUPATION. See ACTION.

VARIANCE. See MISNOMER; RECITAL.

VENIRE—

Venire for a petit jury should not contain a panel for a grand jury also. Forsythe *v.* State of Ohio, 20.

VOID AGREEMENT. See LANDS; TRUSTEE.

WILL—

Will made in a sister state must be recorded in Ohio, before title to land vests in the devisee. Ex'rs of Wilson & Abraham *v.* Tappan, 174.

See SUPREME COURT.

WITNESS—

A juror may be a witness to relate what claims of a party were allowed by a jury, under a plea of payment. Piatt *v.* St. Clair's Heirs et al. 234.

See PROMISSORY NOTES.

WIFE—

1. Wife can not make a valid lease of her husband's lands. Tullis' Adm'rs *v.* Wiley's Adm'r, 297.

WIFE—*Continued.*

2. Where the contract of the wife may become obligatory by the ratification of the husband, it must be declared upon as the husband's contract, without reference to the wife. Tullis' Adm'rs *v.* Wiley's Adm'r, 298.

3. Lease for life by husband and wife, of the wife's estate, not acknowledged by the wife as the statute requires, is not available against the wife after the death of the husband. Worthington's Lessee *v.* Young, 335.

See DOWER.

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